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R25

# DIRECTIONS

**Review  
of Ontario's  
Regulatory  
Agencies**

**Report**





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## **Review of Ontario's Regulatory Agencies**

**Report**



Prepared for the Management  
Board of Cabinet.  
TORONTO, ONTARIO  
SEPTEMBER 1989.

QUEEN'S PRINTER FOR ONTARIO  
ISBN 0-7729-5921-8

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## ACKNOWLEDGEMENTS

This Report has been prepared over a period of twelve months and during that time I have been greatly assisted by a small staff consisting of Sylvia McConnell, who has been responsible for the operations of our office and organizing a very sizeable program of research, interviews and conferences; and Martin Campbell, a lawyer on loan from the Ministry of the Attorney General who has greatly assisted me with legal research and drafting legislation which I propose in this Report. The help of both of these specialists has been invaluable.

In order to verify a great deal of information and to consider the practicality of many of the recommendations which I have made, I have interviewed nearly all the Chairpersons of the 91 agencies which this Report describes. Many of the Chairs have read and reread drafts of parts of the Report. I am very grateful to these men and women for whom I have the highest regard as public servants.

I have also interviewed and corresponded with a large number of specialists elsewhere in Canada, the U.S.A., England and Australia. To them, I express my appreciation.

It goes without saying that I have been assisted by a number of the Ministers of the Crown and Deputy Ministers whom I consulted. I am particularly appreciative of the assistance I have had from the senior people in Management Board.

I have listed, in alphabetical order, in an Appendix, the names of the men and women who have generously given their time to assist us.

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## INDIVIDUALS INTERVIEWED

Abella, Rosalie	Chair Ontario Labour relations Board
Ackroyd, A.O.	Chair Public Utilities Board Alberta
Alfieri, Domenic	Assistant Deputy Solicitor General Public Safety Division
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Archer, Douglas	Ontario Provincial Auditor
Arthurs, Professor Harry W.	President York University
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Barr, David A.	Executive Director, Communications Division Ministry of Culture and Communications
Barrett, Harry	Chair Health Disciplines Board
Bates, Noel	Solicitor
Bayly, Terk	Chair Niagara Escarpment Commission
Beauregard, Remy M.	Executive Director Office of Francophone Affairs

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Beck, Stanley	Chair Ontario Securities Commission
Bell, John	Counsel Standing Committee on the Ombudsman
Bellis, J.A.	Counsel Ontario Law Reform Commission
Bellmore, Brian	Lockwood Bellmore and Moore
Bielski, V.W.	Chair Ontario Telephone Service Commission
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Breithaupt, James R.	Chair Ontario Law Reform Commission
Brent, Gail	Chair Public Service Grievance Board
Brooks, Peter	Vice-Chair Ontario Municipal Board
Brown, D.J.M.	Blakes

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Calder, Wendy	Chair Criminal Injuries Compensation Board
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Caplan, Elinor	Minister of Health
Chaloner, Richard	Deputy Attorney General
Cohen, Marvin M.	Chair Hospital Appeal Board
Colbourne, Doug	Vice-Chair Ontario Municipal Board
Combs, John W.	President John W. Combs, Ltd.
Connolly, Mal	Member Ontario Police Arbitration Commission
Cooke, George	General Manager Automobile Insurance Board
Cosens, Keith	Special Projects Coordinator Office of the Premier Manitoba
Cottle, Cheryl	Senior Legal Counsel Ontario Automobile Insurance Board

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Crohn, Madeline	President National Institute for Dispute Resolution Washington, D.C.
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Devins, William	Chair Produce Arbitration Board
Drea, Frank	Chair Ontario Racing Commission
Drinkwalter, Douglas	Chair Ontario Police Commission
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Eakins, John	Minister of Municipal Affairs
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Edles, Gary J.	General Counsel Administrative Conference of the United States
Eichmanis, John	Senior Policy Advisor Information and Privacy Commission
Elgie, Dr. Robert G.	Chair Workers' Compensation Board
Ellis, Ron	Chair Workers' Compensation Appeals Tribunal

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Elston, Murray	Chair Management Board of Cabinet and Minister of Financial Institutions
Evans, Professor John	Osgoode Hall Law School York University
Ewart, Douglas J.	Director Policy Development Division Ministry of the Attorney General
Fairweather, Gordon	Chair Immigration and Refugee Board of Canada
Falardeau-Ramsay, Michele	Chair Immigration Appeal Board
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Fingland, Frank	Deputy Minister Executive Council Office Yukon Territories
Fischer, Peter A.	Executive Officer Environmental Compensation Corporation
Frecker, John	Commissioner Law Reform Commission of Canada
Fulton, Ed	Minister of Transportation
Gibbons, Valerie	Deputy Minister Consumer and Commercial Relations
Gillespie, Gillian	Manager, Agency Operations Ministry of Culture and Communications
Gracey, Don	President C.G. Management and Communications, Inc.

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Grange, Mr. Justice Samuel	Justice Supreme Court of Ontario Court of Appeal
Grossman, David	Communications Advisor Management Policy Division Management Board Secretariat
Hawkes, Robert H.	Superintendent Pension Commission of Ontario
Hayden, Andrew S.	Chair and Chief Executive Officer Regional Municipality of Ottawa-Carleton
Henriksen, Sheila	Chair Ontario Parole Board
Hewitt, Ron	Associate Deputy Minister to the Premier and Clerk of the Executive Council Saskatchewan
Hill, Dr. Daniel	Ontario Ombudsman
Jacobsen, Pat	Associate Secretary of Cabinet for Executive Resources
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Jefferey, Michael I.	Chair Environmental Assessment Board
Johnson, Edward R.	Member Ontario Police Arbitration Commission
Johnson, John M.	Assistant Deputy Attorney General Civil Law
Jones, Anne	Chair Ontario Film Review Board
Jordan, Michael	Executive Coordinator Management Policy Division Management Board Secretariat
Karakatsanis, Andromache	Chair Liquor License Board of Ontario

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Kazanjian, John	Chair Ontario Police Arbitration Commission
Kelch, Margaret	Assistant Deputy Minister Safety and Regulation Ministry of Transportation
Klein, Leslie	Acting Chair Fire Code Commission
Knox, Henry	Vice-Chair Environmental Appeal Board
Knox, Ken	Chair Farm Products Marketing Commission
Kontak, Michael A.	Secretary to the Executive Council Nova Scotia
Kruger, John	Chair Ontario Automobile Insurance Board and Pension Commission of Ontario
Laskin, John	Solicitor Tory Tory
Lawkuce, Judge Glenn	Administrative Law Judge Washington, D.C.
Lawrence, John E.M.	Lang, Michener, Lash, Johnston
Leatch, Joanne	Senior Counsel and Manager of Legal Unit, Social Assistance Review Board
Le Blanc, Eugene	Executive Coordinator Policy Development Ministry of Health
Leitch, Donald A.	Clerk of the Executive Council Manitoba
Linden, Sidney B.	Ontario Information and Privacy Commissioner

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Lockett, Peter	Counsel Ministry of the Attorney General
Loveys, Marjory	Chair Environmental Compensation Corporation
Lundeen, Richard	Executive Director, Pensions and Benefits Policy Management Board of Cabinet
Luo, Haocai	Vice-President Peking University
MacDonald, R.A	Dean, Faculty of Law McGill University
MacGillivray, Janeanne	Boards and Committees Secretariat Yukon Territories
Manzig, Professor John	Director Environmental Compensation Corporation
Mathura, Randolpf E.	Director Engineering Marketing and Environmental Analysis United States Federal Energy Regulatory Commission
MacDonnell, W.R.	Director Ontario Racing Commission
McGuigan, Mr. Justice Marc	Federal Court of Appeal
McLaren, Elizabeth A.	Assistant Deputy Minister Finance and Administration Ministry of Agriculture and Food
McLean, Allan, M.P.P	Chair Government Agencies Commitee
McLellan, Ethel	Retired senior public servant

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McLeod, Jean-Anne	Coordinator (Expenditure) Programs and Estimates Division Management Board Secretariat
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Meslin Eleanor	Executive Director Office of the Ombudsman
Molloy, Anne	Director of Legal Services Ontario Human Rights Commission
Monkman, Gerry	Chair Building Code Commission
Morrison, Gail	Director, Investigations Office of the Ombudsman
Mullan, Professor David	Faculty of Law Queen's University
Nason, Harry A.	Chair of the Executive Council and Secretary to Cabinet New Brunswick
Nelson, Jerome	Administrative Law Judge United States Federal Energy Regulatory Commission
Newby, Ann	Director Cabinet Operations Office of the Premier British Columbia
Nichols, Cindy, M.P.P	Chair Ombudsman Committee
Nixon, Robert	Treasurer of Ontario
O'Neal, Maureen	Deputy Minister Ministry of Culture and Communications

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Obonsawin, Donald A.	Deputy Minister Ministry of Municipal Affairs
Oddie Munro, Lily	Minister of Culture and Communications
Ouellette, Professor Yves	Faculty of Law University of Montreal
Pathe, Victor L.	Assistant Deputy Minister Industrial Relations Division Ministry of Labour
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Perlin, Dennis Y.	City Solicitor City of Toronto
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Priest, Margot	Chair Ontario Telephone Commission
Ratushny, Professor Ed	Faculty of Law University of Ottawa
Ray, Dr. Ratna	Chair Rent Review Hearings Board
Raymond, Gerard J.M.	Chair Ontario French Language Services Commission

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Read, Jean M.	Director Office of Arbitration Ministry of Labour
Reel, Ken	Secretary Building Code Commission
Reid, Mr. Justice Robert	Justice Supreme Court of Ontario High Court of Justice
Revell, Donald	Senior Legislative Counsel Ministry of the Attorney General
Riddell, Jack	Minister of Agriculture and Food
Robardet, Patrick	Coordinator Administrative Law Project Law Reform Commission of Canada
Roman, Andrew	General Counsel The Public Interest Advocacy Centre
Sanderson, Robert	Chair Grain Financial Protection Board
Saunders, Professor C.A.	President Administrative Review Council of Australia
Schneider, Howard B.	Assistant General Counsel Producer Regulation United States Federal Energy Regulatory Commission
Schopf, Michael	Associate General Counsel Enforcement, General Law and Rule Making United States Federal Energy Regulatory Commission
Schwartz, Alan	Coordinator Health Professions Legislation Review
Scott, Ian	Attorney General of Ontario

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Seim, Robert D., Ph.D., Psych	Chair Child and Family Services Review Board
Shime, Owen	Chair Grievance Settlement Board
Shirlow, Joan	Secretary Public Service Grievance Board
Silcox, David P.	Deputy Minister Ministry of Culture and Communications
Sillers, John S.	Solicitor The Municipality of Metropolitan Toronto
Sloan, John R.	Secretary Management Board of Cabinet
Smith, Barry	Chair Ontario Highway Transport Board
Solomon, Harvey E.	Director Institute for Court Management of the National Center for State Courts Denver, Colo.
Somerlot, Douglas	American Bar Association
Sommerville, P.B.	Counsel Ontario Trucking Association
Sopinka, Mr. Justice John	Justice Supreme Court of Canada
Sprague, James	Solicitor Ottawa
Springman, M.A.	General Counsel and Director of Research Ontario Law Reform Commission
Stanley, H.H.	Clerk of the Executive Council and Secretary to Cabinet Newfoundland and Labrador

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Starkman, David	Vice-Chair Workers' Compensation Appeals Tribunal
Steele, Debbie	Chair Farm Tax Rebate Appeal Bord Ministry of Agriculture and Food
Stewart, Henry	Chair Ontario Municipal Board
Swayze, Gordon W.	Chair Board of Negotiation
Sweeney, John	Minister of Community and Social Services
Swinton, Katherine	Chair College Relations Commission
Switzer, Dr. Clayton	Deputy Minister Ministry of Agriculture and Food
Symes, Beth	Chair Pay Equity Hearings Tribunal
Tellier, Paul M.	Clerk of the Privy Council and Secretary to the Cabinet Canada
Tilford, Karen	Management Board Officer Management Policy Division Management Board Secretariat
Tocher, Barry	Executive Director Liquor Licence Board of Ontario
Todres, Elaine	Deputy Ministry Human Resources Secretariat
Trow, Timothy	General Counsel Office of Francophone Affairs
Vial, Donald	Commissioner Public Utilities Commission State of California

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Watt, R.	Chair License Suspension Appeal Board
White, Frank	Director Freedom of Information and Privacy Branch
Wilson, Gordon	President Ontario Federation of Labour
Wilson, Robert J.	Member Ontario Police Arbitration Commission
Wong, Robert	Minister of Energy
Wright, Tom	Director of Legal Services Information and Privacy Commission
Wrye, Willian	Minister of Consumer and Commercial Relations
Wychowaneec, Stephanie	Chair Commercial Registration Appeal Tribunal
Zacks, Michael	General Counsel Office of the Ombudsman
Zuber, Mr. Justice T.E.	Justice Supreme Court of Ontario Court of Appeal

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# CHAPTER 1

## INTRODUCTION

The effect of agencies on the lives of Canadians is pervasive. They impact almost every aspect of our daily lives morning through night. Behind the waking sounds of the clock radio is the CRTC, the licensor of the radio station. The electricity powering the radio is provided by Ontario Hydro. The furnace, hot water heater and the stove may all run on natural gas which is provided under federal and provincial regulation. The eggs and the milk in the morning omelette are subject to grading and production quotas set by provincial egg and milk marketing boards.

In our homes, most materials, appliances, and machines are subject to some administrative agency. Even the family car, its fuel, insurance, and certified mechanic are under the eye of agencies. At work a federal or provincial relations agency may be involved in labour relations issues, safety regulations, fair trade practices and so on.

Few industries or businesses are unaffected by regulatory bodies. Government agencies influence sports and cultural activities and monitor the air we breathe, the appearance of the cities and towns around us and the condition of our natural environment. This plethora of governmental agencies is a reflection of the increase in government services and responsibilities since the second world war. There are now about 1,500 agencies in Canada of which 580 are in Ontario. They range widely in size and nature from the Wolf Damage Assessment Board to the Ontario Labour Relations Board. They also vary in the way they function and in their relations with the government and the public.

The Ontario government uses sixteen different terms to identify its agencies: institute, commission, council, foundation, governors, corporation, centre, association, panel, guild, referees. Curiously, none of the 580 provincial agencies is actually called an agency.

These 580 can be categorized in different ways depending on the point of view of the categorizer. Ontario Management Board of Cabinet groups them as follows:



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Agencies which give advice;  
Agencies which operate a business or a program;  
Agencies which make decisions, ie. regulatory or administrative agencies.

This report is prepared in response to the Management Board of Cabinet's requirement for "an in-depth review of Regulatory Agencies, Boards and Commissions (ABC's) to support its objectives of ensuring efficient, effective service delivery in government".

There are ninety-one Ontario government agencies in category (3), which are referred to as administrative agencies throughout this report.

I was asked to look into a number of aspects of these administrative agencies. It became evident however, that over and above the questions relating to individual agencies, there was a greater need to examine in broad terms the status, purpose and functioning of administrative agencies in Ontario.

Administrative agencies have evolved in the years since the second world war into a significant and important manifestation of government. Because each agency has been created individually and on an *ad hoc* basis, there is extraordinary variety and inconsistency in their powers, methods of operation, relations with their ministries, etc. Accordingly, what really needs to be examined and resolved before individual agency evaluations can be useful, is the overall problems of agencies as a whole. I firmly believe that any attempt to review individual agencies without having some new structures in place will only perpetuate a situation that is complex and inconsistent and in some respects badly out of date.

It is in the interests of the people of Ontario to have administrative agencies which are accessible, efficient and responsive to the competing needs of individual rights and the public interest. In the course of this report, I have sought to make recommendations to this end, recognizing that agencies are part of the organic whole of government in Ontario and that change and improvement in the field will be best brought about by a carefully coordinated set of related changes.

A major recommendation of this report is to establish an Administrative Agency Council which would have a consultative, coordinating, training and evaluative function relating to

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all administrative agencies. Similar councils exist to great advantage in a number of other jurisdictions, including the USA, Britain, and Australia. While most of the other recommendations in this report could be implemented without such a council, its existence will greatly facilitate many needed changes. Reference to such a council is made frequently throughout the report.

## HOW TO USE THIS REPORT

**CHAPTER 1** discusses in broad terms the relevance of agencies to our everyday lives and scope of their impact. Further, the purpose of the report is discussed in some depth.

**CHAPTER 2** identifies the nature of agencies, specifically what they are, how they function and emphasizes the great variety of views that exist on administrative agencies.

**CHAPTER 3** examines relations between the courts and agencies; their similarities and differences. The similarities are misleading and can lead to serious misunderstanding of the role of administrative agencies.

**CHAPTER 4** looks at the historical background and legal theory which underly the Statutory Powers Procedure Act. It is important to understand this background before considering the wide ranging recommendations regarding agency powers made later in the report.

**CHAPTER 5** provides a survey of the major problems that the agencies now experience.

**CHAPTER 6** is concerned with one particular problem. The relationship between administrative agencies and the Office of the Ombudsman is discussed in detail.

**CHAPTER 7** investigates the question of agency costs and proposes that Ontario agencies recover more money in the interests of equity, the provision of better services and an enhanced contribution to the general revenues of the province.

**CHAPTER 8** makes a large number of structural and practical proposals to improve agencies. The chapter concludes with a proposal to establish an Administrative Agency Council.

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**CHAPTER 9** contains recommendations to strengthen and clarify the powers of administrative agencies. Areas of concern are identified and described and draft amendments to the Statutory Powers Procedure Act are outlined. These are provided as 31 amendments to the SPPA.

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## CHAPTER 2

### AGENCIES — A DEFINITION

#### 2.0 INTRODUCTION

This Chapter deals with administrative agencies in Ontario. What are they? How many are there? Why do they have so many kinds of names? Why are they created in the first place? What do they do and who are their members? What are their powers? Are they a little like, a lot like, or not at all like, courts?

#### 2.1 WHAT IS AN AGENCY?

Agencies are hard to fit into the structure of this country as conventionally perceived, because agencies are somewhere in between a government and a court. Traditionally, judicial functions are carried out by judges, legislative functions are carried out by members of the Legislature and executive functions are carried out by Cabinet. Agencies can operate in all three modes at the same time. This triple function is unique to agencies. It separates agencies from the courts (which only adjudicate); from legislatures (which only legislate), and executives (which generally speaking, direct and execute).

Agencies perform their functions by adjudicating, legislating, and administering. Often this happens in the same hearing based on the same evidence. No court does that! No legislation does that! No Cabinet does that!

This combination of functions often makes it very difficult for courts and laymen alike to see the boundary between when an agency is adjudicating, when it is legislating and when it is administering. So long as the functions are kept identifiably separate, each will have its own standards of performance. It is when they are mixed together that confusion and debate are created in the mind of the observer.

In fact, it is this triple role and the assumptions made by the courts and others, which have lead to many of the misunderstandings which plague agency administrative law.



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The common law sets out certain minimum standards of procedural fairness in terms of adjudicative hearings. As Lord Denning stated in *Kanda v. Government of Malaya* [1962] A.C. 322 at p. 337:

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made which affect him: and then he must be given a fair opportunity to correct or contradict them.”

The common law also gives agencies, which act in an adjudicative mode, significant autonomy to create their own procedures for hearings.

The basic requirements of the rules of procedure for an agency will differ depending upon what the agency is doing when it holds hearings and makes decisions. Thus it is important to understand what the agency is doing when it holds hearings and makes decisions. As Dickson, J. (as he then was) affirmed in *Martineau v. Matsqui Institution Disciplinary Board* (No. 2), [1980] 1 S.C.R. 602, the procedures required to meet the minimum standards (known as the *audi alteram partem* rule) will vary from agency to agency and hearing to hearing. In his dissenting judgement in *Homex Realty and Development Company Limited v. Village of Wyoming* [1980] 2 S.C.R. 1011 at pp. 1051-2, Dickson, J. (as he then was) stated:

“Above all, flexibility is required in this analysis. There is, as it were, a spectrum. A purely ministerial decision, on broad grounds of public policy, will typically afford the individual little or no procedural protection .... On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards, particularly when personal or property rights are targetted, directly, adversely and specifically.”

I shall return to this extremely important distinction in Chapters Three and Four, where I discuss the differences between courts and agencies.

The actual name of an agency will tell the reader little. Ontario has 580 Agencies, Boards and Commissions which are, regardless of their names, “agencies”. I have included at the end of this Chapter, as Appendix 2-1, a list of the 580 agencies. All Boards are agencies; all

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Commissions are agencies; all Authorities are agencies; all Tribunals are agencies; all Councils are agencies, etc. No matter what these organizations are called, they are agencies.

For the purposes of this Report, I call all of these entities, “agencies”. The sense in which the word “agency” is used defines an agent as one who acts for another and with his authority. An “agency” is then, an organization created directly or indirectly by the Legislature of Ontario to act either for it or a Ministry of the Crown. The agencies do for the Legislature what the Legislature could do for itself. Thus agencies are not independent of the Legislature and can be terminated at the pleasure of the Legislature.

An agency has only the explicit authority that it is given by its mandating statute. Explicit powers may be enlarged by implied powers attributed to the agency to enable it to carry out its mandating legislation.

I discuss implied powers of agencies later in this Report. For the sake of simplicity, only the explicit powers which an agency possesses are discussed in this Chapter.

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## 2.2 THE CATEGORIZATION OF AGENCIES

It is easier to tell a book by its cover than to tell what task an agency performs by looking at the name of the agency. The 580 agencies in Ontario have an assortment of names that suggest that there are about 16 types of agencies. The types include the following:

- an institute;
- a commission;
- a tribunal;
- an authority;
- a board;
- a committee;
- a directorate;
- a council;
- a foundation;
- governors;
- a corporation;
- a centre;
- an association;
- a panel;
- a guild;
- referees.

Not one of the 580 agencies bears the name “agency” yet the Government classifies all 580 as “agencies, boards and commissions”. The titles seem to have been picked out of a hat. At the Federal level, there are about 130 agencies: 22 Commissions, 31 Boards, 19 Councils and 58 other types. All told, Parliament uses 23 different names to describe 130 agencies, while Ontario uses 16 names to describe 580 agencies.

Although I discuss the role of the courts and how they relate to administrative agencies in greater detail later in this Report, it would be useful to mention to the reader that historically the courts have carried out a “supervisory role” in relation to administrative agencies to ensure that the agencies do not exceed the authority delegated to them by the Legislature. While carrying out this function, the courts have tended to create their own categories of agencies.

The courts long ago accepted that they would not interfere in the decisions of an agency

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unless it is carrying out an adjudicative function. As pointed out, modern-day agencies ordinarily carry out a number of functions other than adjudicating, such as administering and legislating. Historically, the courts have shied away from intervening when an agency is legislating or when it is administering. Accordingly, the courts have had to try to develop criteria to define when an agency is carrying out different functions. This has been done to no one's satisfaction, including the courts. The court's functional approach has unfortunately evolved into a classification of agencies as follows:

- **Administrative Agencies;**
- **Legislative Agencies; and,**
- **Adjudicative Agencies.**

One can hear descriptions of agencies, which have little value, such as “the more adjudicative tribunals”, “the purely adjudicative tribunals” and even “quasi-judicial tribunals”. Even the word “tribunal” is used to suggest that some agencies are tribunals and others are something else, and that when an agency is called a “tribunal”, it has some kind of adjudicative capacity or characteristic not associated with other agencies. Dividing agencies into these categories is not helpful. In fact, it is misleading because most agencies fulfil all three functions at some time or another.

Even if one was to accept the functional characterization of agencies, one has not been helped in the least, because even the courts have great difficulty separating the functions. The difficulty is compounded by the fact that even the court can not tell what function an agency is performing, until the function has taken place. Looking *ex post facto* at a single decision of an agency is hardly helpful in categorizing what kind of an agency one is observing.

Experience demonstrates that in practice, agency functions are not exercised separately and in fact often cannot be separated. What one comes to realize is that most agencies are something quite different from the sum of their functions. Once one realizes that the whole can be more than the sum of the functions, one can see that an agency may be operating in a form unfamiliar to the courts. I do not go so far as to say that this is always the case. One should carefully examine the entire operation of the agency, before making a decision as to what practices, procedures and standards should apply. It seems to me that we can, with justification, depart from the functional approach.



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Ontario Management Board of Cabinet groups agencies differently:

- **Advisory.** These agencies advise but do not make decisions (The Ontario Law Reform Commission);
- **Operational.** These agencies operate a business or program (Ontario Hydro);
- **Regulatory.**

This categorization of agencies, although helpful to Management Board does not give us a better understanding of agencies or their operations.

The reader will have noted that the terms of reference of this Report do not include advisory or operational agencies and, therefore, I shall not comment upon them. What we are left with in this Report are the 91 agencies which Management Board calls “Regulatory”. The problem with categorizing agencies as *Regulatory* is that the word is misleading. The word, as used, is meant to embrace agencies which administer, legislate, adjudicate and regulate. These 91 agencies range from those which operate a little like a court to those which operate nothing like a court.

Management Board defines a “regulatory agency” as one whose prime function is the control of public or private sector operations as authorized by government legislation; the exercise of a license review function; or the exercise of an appeal function with respect to both government and third-party decisions. Management Board then sets forth a list of 91 “regulatory agencies” (see Appendix 2-2). Obviously, Management Board, by using the word “regulatory” found an umbrella word. The role of a regulator is quite different from that of an adjudicator, although a regulator can be an adjudicator.

Today, functionalism is really causing more trouble than it is solving and as a consequence ought to be abandoned. The fact is that today the easiest way to categorize agencies is not to do so. One can waste endless time arguing over whether this agency or that agency ought to be grouped as “adjudicative”, “administrative “ or even “legislative”.

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## 2.3 CAN AGENCIES BE USEFULLY CATEGORIZED?

If the reader will look at Appendix 2-1, it will be noted that there are some very interesting groupings of agencies. Some of the 91 agencies discipline the holder of a license or the right to practice a profession. Some agencies grant permits by allocating crops, market share, delivery points, milk quotas and standards, and quality of service. At the same time, the same agency may hear complaints by producers and distributors, including the recovery of money for unpaid accounts. Some agencies fix revenue requirements which are the basis of rate making, and some agencies investigate abuses of human rights or the failure of due process. Some agencies award damages for those injured by criminal activity, and some agencies make sure that pay equity standards are in place and being observed. Some agencies apply public interest standards, whereas others focus on the rights of individuals. The groupings are extensive.

Despite dissimilarities, there are many similarities among the 91 agencies. First, they all carry out tasks which could be done within the government. Secondly, while the various agencies have different mandates and configurations, they exhibit certain similarities in power. If one has the working knowledge to spot the common features and operations, the 91 agencies can be grouped in other ways:

- **By the importance of the interest or individual rights which are involved, at issue or in conflict.**
- **By mandated category as follows:**
  - (i) **Agencies which investigate and advise. These agencies may, of course, hold hearings;**
  - (ii) **Agencies which deal with appeals (to appeals I would add agencies which deal in mediation, conciliation and arbitration);**
  - (iii) **Agencies which hear problems between individuals or between individuals and the government;**
  - (iv) **Agencies which monitor and regulate substantial segments of the economy;**
  - (v) **Agencies which deal with land planning, assessment and values;**

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- (vi) **Agencies which deal with employment, wages, pensions and social assistance;**
  - (vii) **Agencies which set standards and quotas and which include marketing boards; and,**
  - (viii) **Agencies which deal primarily in natural resources, preservation and conservation.**

Whether the above categories of agencies are any more useful than others, at least they have the advantage that they disclose the general purpose and role of agency mandates. Once it is understood that the above categories define what agencies actually do and describe agencies which adjudicate, legislate (policy-making), administrate and regulate, it can be seen that the traditional classification of agencies is really quite out of date.

The 91 agencies have many of the same problems, no matter what their mandates. Before moving to discuss the problems which agencies face, I would first like to address why we have agencies.

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## 2.4 WHY ARE AGENCIES CREATED?

Each year new areas of public concern develop and as a rule a new agency may be created to deal with the matter. Such was the case of the creation of the Ontario French Language Services Commission and the Pay Equity Commission as only two recent examples.

**The alternatives to the agency system are well known:**

- **The Legislature itself could perform all or most of the agency mandates.**
- **Some of the work assigned to agencies could be performed by the courts.**
- **Likely all of the work assigned to agencies could be performed within one or any of the Ministries of the government;**
- **Some of the work assigned to agencies might be eliminated; like not granting some form of discretionary compensation.**

Although alternatives to agencies do exist, the alternatives have been rejected in most cases and agencies preferred for some of the following reasons.

1. The immense volume of government interaction and intervention in the private and public sectors has forced government more into planning and less into implementation. The huge weight of government has forced it to stand back and leave most implementation to others including agencies. The magnitude of the Ontario government today can be measured in terms of its 85,000 employees who handle about 600 different Acts; the consolidated version of which occupy 11,000 pages of print, which in turn are supported by about 1,500 regulations occupying over 25,000 pages of paper.
2. It is easier, quicker and less expensive to implement innovative government strategies through agencies, rather than through the cumbersome legislative process (days as opposed to years).
3. The need to delegate specialist tasks to specialists, can be done more easily through agencies than through the generalist civil service.



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4. It is easier to place legal limitations upon an agency, and less risky to the reputation of the government than to place the mandate upon the civil service, for which the government is seen to be its employer.
  5. With its immense size, government can be more flexible working through a small number of agencies than working through 85,000 public servants.
  6. Agencies allow the government to operate with greater freedom from political pressure.
  7. Agencies provide a specialized, highly trained, technical response on a daily and case by case basis.
  8. Agencies permit a lower unit cost of response to recurring problems.
  9. Agencies are an attractive alternative to adding routine administrative matters to the heavy caseload of the courts.
  10. Agencies offer an inexpensive alternative to the very high cost of gaining access to the courts to enforce rights that fall within the administrative arena.
  11. Agencies relieve Ministers from sensitive political decisions by placing issues in a non-political setting.
  12. Agencies are an excellent arena in which to test administrative policy before being adopted or rejected by a Ministry. This leaves the Ministry in effect as a decider of last resort.
  13. It facilitates the supervisory review by the courts when the decision is made by an agency rather than a Minister.
  14. An agency is a very manageable forum for public participation, which is one of the corner-stones of open government.
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15. Agencies are the only real forum where there can be exercised administrative, legislative and adjudicative skills by the same body. It is neither possible nor desirable to do so with the courts and it is impossible to do so within a Ministry.
  16. It is easier in various ways for a government to overturn or otherwise deal with a wayward decision of an agency than it is to overturn a Ministerial decision (it is easier to shoot someone else's messenger than your own).
  17. Agencies are an inexpensive and experienced forum within which to search out solutions to report to the Cabinet without the Cabinet becoming immediately involved.

Clearly, there are many valid reasons to create agencies.

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## 2.5 SOME INTERESTING FINDINGS ABOUT AGENCIES

I forwarded a questionnaire to all Ontario agencies (far more than the 91) in the Spring of 1988 in order to carry out some research into agencies generally. Copies of the questionnaire and answers have been filed (with other reference material) with Management Board.

### FINDINGS

- The mandating legislation for approximately 80% of the agencies has been amended to some extent since 1980, but 50% of the agencies feel that their legislation needs amendment now.
- The vast majority of the agencies themselves are of the opinion that their mandate requires them to provide a number of functions including: adjudicating, rule making, policy making, operating, legislating, administering or regulating.
- Approximately 30% of the agencies have their own budgets separate to the Ministry to which the agency reports. The other 70% of the agencies are financed through a Ministry budget.
- Agencies cost the tax-payers approximately \$160 million a year. The agencies raise approximately \$25 million to off-set costs (far short of what they ought to raise, as discussed in Chapter Seven).
- About 15% of the agencies have the power to recover their hearing expenses or to award costs to parties at a hearing, but very few do so.
- 66% of the Chairs of agencies have Memoranda of Understanding with the Minister to which the agency accounts. Most MOU's are either out of date, can't be found, are never referred to, or are thought to be irrelevant.
- The vast majority of the Chairs and the members believe that there ought to be a Memorandum of Understanding between the Agency and the Ministry to which the agency accounts. I deal with this in Chapter Eight.
- The 91 agencies in total would appear to have about 1,200 members and 500 staff. This number cannot be averaged, because some agencies have no staff or use the staff of a Ministry. Some agencies have 75 members and many have 10 or less.

- Only 40% of the agencies have published rules. A large number of agencies have no rules at all.
- Only 30% of the agencies have Manuals of Operation and of these only half are available to the public. Thus in only 15% of the agencies can the public meaningfully review or understand the operations of the 91 agencies.
- 40% of the agencies have their own hearing rooms. 60% either rent outside quarters or use government rooms, including Ministerial Board Rooms. In the latter cases, note that the public has shown concern about the appearance of agency bias, particularly in agency hearings where the Minister also appears before an agency, the members of which he appoints.
- Only 25% of the agencies provide a reading room where the public or counsel can inspect an agency file. About 10% of the agencies provide photocopying.
- 66% of the agencies publish their own annual report. 70% of these think their reports are a useful public information document. The total cost of the annual reports appears to be in the \$200,000 range. About 33% of the agencies are referred to in the parent Ministry annual report to the Legislature.
- Approximately 33% of the members of agencies are full-time and 66% part-time.
- The appointments range from one year to three years (approximately 50%), from five years, to "at pleasure" (approximately 30%), or are "at will". Some contain no term at all.
- The salary of the chairs ranges from \$104 per day to \$500 per day and from \$25,000 per year to \$114,564 per year.
- The salaries of part-time members range from \$85 per day (about \$10 per hour) to \$250 per day, (about \$35 per hour); and for full-time members from \$38,600 per year to \$85,000 per year.
- It would appear that approximately 25% of the members are lawyers, 25% are women, 75% have University degrees, 65% have a specialty and 10% are Francophones. The average age of members is 48.
- The average years of service is between four and four and a half.
- Agencies estimate that the length of time taken in training to become a fully active member is 18 months (the learning curve).
- Approximately 60% of the agencies hold public hearings.
- Of the hundreds of thousands of files handled by the 91 agencies each year, 15,000 result in public hearings.



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- Only two agencies have ever funded an intervention and in only one case did the funds come from the agency itself.
  - Slightly more than 50% require a quorum of three, 20% a quorum of over three, 15% a quorum of 2 and 15% require a quorum of one.
  - 10% of the agencies permit a single member to report to the whole agency for its decision, and 10% permit a single agency member to make a decision for the whole agency.
  - The average number of days for long hearings is 50 days, while the average for short hearings is eight days. Some hearings have lasted a year and others an hour.
  - About 20% of the agencies have engaged outside consultants to testify before the agency.
  - Nearly 70% have no counsel of their own. 25% have their own counsel and five have more than one counsel of their own.
  - About 15% of the agencies engage counsel outside the government on occasion.
  - Approximately 20% of the agencies use some of their staff as witnesses.
  - Public attendance at a hearing ranges from 400 as a high to 1 as a low. The average high attendance is 81 and the average low is 7.
  - Approximately 20% use prehearing conferences of one type or another, while approximately 12% use paper hearings.
  - In preparing for a hearing the average agency staff spends 17 man hours (a regulatory agency may spend 1,000 hours) and the panel on average spends 9 hours in preparation (a regulatory agency may devote 500 hours for each panel member to prepare for a hearing).
  - Approximately 80% of the agencies require some type of prefiled material, but only 15% regard this prefiled material as “extensive”.
  - Staff review the prefiled material in 85% of the agencies and the panel members review it in 90% of cases.
  - 50% permit panels of witnesses, but only eight do so frequently.
  - 55% use reporters on occasion and 45% do not.
  - 20% obtain daily transcripts.
  - A long decision is 600 pages and a short one is 1 page. Approximately 50% are about 5 pages, 30% are from 5 to 19 pages, 5% are 20 to 35 pages and about 2% are over 35 pages.
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- 75% of the agencies hold hearings around the Province and about 25% sit in Toronto only.
- 80% of the agencies expect that they will hold hearings in French, but were greatly divided as to whether none, some or all of the filed material, the evidence, the decisions will be in French; and whether a translator will be sufficient to comply with the Act.
- 25% of the agencies can state a case, but only 10% have done so.
- A substantial number of agencies are guided in their mandates by the public interest.
- Eight of the agencies indicated that their decisions can be petitioned to the Cabinet, but only six of the eight agencies have ever have been petitioned. These include: the Ontario Municipal Board (231), the Environmental Assessment Board (10), and the Ontario Highway Transport Board (12), and the Ontario Energy Board, the Ontario Farm Marketing Commission and the Environmental Appeal Board.
- 90% of the mandates permit a decision to be appealed to the Divisional Court, of which there appear to have been 206 reported decisions by the Court, in the last five years.

These findings tell us something about agencies but leave a great deal more unsaid. Some day I would hope that the government might conduct a greater in-depth study of all its agencies including the 91. What is not known about agencies in Ontario is substantial and the absence of hard information is a liability which could easily be corrected by the Council. It would not cost a great deal of money to obtain the information. It would be useful both to Treasury, Management Board, the respective Ministries, the Agencies, and others, including, of course, the public.

### 2.5.1 CONCLUSIONS

Some conclusions can be drawn from this material.

**First** — There is significant sheltering of agencies under the wing of Ministries, which I suspect the agencies did not think on the whole, existed. This is not inconsistent with my own view of the relationship which exists and ought to exist between the government and the agencies - namely that agencies are, what the name implies, agents of the Legislature.

Agencies are attached to but are not an arm or an extension of the Ministries. The Ministries account to the Legislature for the agencies.

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**Second** — The findings indicate that there is not as much public disclosure by the agencies of their operations and practices as there ought to be. It is agreed generally that the public ought to understand how agencies operate and what a member of the public can expect when asked to appear before an agency to take part in its deliberations. Disclosure by the agencies of their policies and operations is discussed in subsequent Chapters.

**Third** — Salaries and terms of service are so disparate across agencies that they should be reviewed, analyzed and coordinated. There must be flexibility in salaries and terms of service, but at the same time there ought to be some consistency.

**Fourth** — A uniform approach is not taken by Ministries to agency operations and until there is, administrative procedure and credibility will suffer.

**Fifth** — The practice, procedure and mandates of all agencies are extremely diverse. To many, this diversity will justify doing nothing to coordinate that which can be coordinated, to make consistent that which can be made consistent. I believe that quite the opposite tack can and should be taken. We ought to coordinate what we can by legislation, direction and cooperation through a Council and leave to the accountable Ministries and agencies, the development and traits that have given administrative procedure much of the strength it now possesses in Ontario. The public is entitled to some basic standard of expectation and performance. Agencies do not exist for the benefit of chairs and members of agencies or civil servants, but rather to deliver the kind and proficiency of service to which the public is entitled, paid dearly for, out of its own taxes.

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## 2.6 THE RELATIONSHIP OF AN AGENCY TO GOVERNMENT

One of the most troublesome areas of the structure of agencies is the relationship which should exist between an agency and the Government. There are many aspects to this vexatious matter, most of which I shall deal with later in the Report, but it is necessary at this stage to deal with the matter of the so called “independence” of agencies.

One cannot read or listen to administrative law being discussed without noting the constant references to phrases such as “the independence of tribunals.” For years authors, judges, politicians, bureaucrats, the legal profession, Law Reform Commissions and others, but particularly the chairs and members of administrative agencies themselves, have referred to the “independence” of agencies without stopping to study the word “independence” or to define what is meant by it.

- What does the word “independent” mean?
- Does the word have different meanings in different contexts?
- Does the word have different meanings for different users?
- Are Ontario administrative agencies, “independent”?

It is perhaps easiest for the reader to understand this section if I declare from the beginning that the word “independent” is the wrong word to use to describe the relationship which in fact, and in law, exists between an agency and the Government. The proper perspective is to understand that agencies operate at arm’s length in their decision-making role, but are accountable to a particular Ministry and to the Legislature for their operations and policy functions.

### 2.6.1 WHAT DOES THE WORD “INDEPENDENT” MEAN?

No matter what dictionary you source, *Webster’s*, *Oxford* or *Black’s Law Dictionary* (for example) you will find a definition for “independence” such as:

“The state or condition of being free from dependence, subjection or control. A state of perfect irresponsibility. Political independence is the attribute of a nation



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or state which is entirely autonomous, and not subject to the government, control or dictation of any exterior power.” (*Black’s*, 4th Ed. p.911)

You will also find a definition in any dictionary which parallels that found in *Black’s* for “independent”:

“Not dependent; not subject to control, restriction, modification, or limitation from a given outside source.” (*Black’s*, 4th Ed. p.911)

On the other hand, if one looks at the definition of the word “dependent”, one will find in all dictionaries, a definition which parallels that contained in *Black’s* (p.524).

“Deriving existence, support, or direction from another; conditioned, in respect to force or obligation upon an extraneous act or fact.” (*Black’s*, 4th Ed. p.524)

Additional definitions of the word “independence” include the meaning “free from political association”.

I respectfully suggest that whoever uses the word “independence”, as in the phrase “the independence of administrative agencies” is not using the correct word. Clearly, there is no dictionary in the English language which allocates to the words “independence” or “independent” the kind of meaning attributed by authors and speakers alike when using the phrases “independent administrative agencies,” or “independent administrative tribunals”.

The word “independent”, if used as an adjective, takes on different meanings, dependent upon the noun which it precedes. I also believe that the word “independent”, takes on different meanings when used by different parties. I, therefore, am of the opinion that the word “independent” when coupled with the word “agency” is mischievous and has created any number of false perceptions due to its usage. These beliefs, amongst others, are what has led me to use the word “agency” in the first place. It may be argued that an administrative agency is not an agent of the Legislature, in the strict legal sense, but the concept comes a great deal closer to the real world in operation, than to talk about “independent administrative tribunals”. Agencies, as I have said, should operate at arm’s length in terms of their decision-making but remain accountable in all other respects both to the Ministry and the Legislature.

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## 2.6.2 DOES THE WORD “INDEPENDENT” HAVE DIFFERENT MEANINGS IN DIFFERENT CONTEXTS?

I believe that the answer is clearly yes! In fact, the word now has no real or specific meaning at all, and cannot stand alone unqualified. For example, when we speak about the “independence” of the courts and of judges, we in fact mean that the courts and the judges are different from the rest of us. If one doubts that statement, one ought to look at the Constitutional provisions which set judges, and no one else, apart from the rest of the citizens of Canada. Do we mean that such should be the case for members of agencies? Of course not!

Therefore, even if we knew what the user had in his mind when he speaks of the “independence” of agencies, we know that he could not mean the same thing as implied by the phrase “the independence of the judiciary”. But how do we know? Certainly not by something that the user said to accompany his statement. The fact is surely, that the phrase “the independence of the courts and judges” is a statement with a different meaning from the phrase “the independence of administrative agencies”.

To me, at least, the word “independent”, as used so often, has only its dictionary meaning unless it is qualified by the noun which it precedes AND UNLESS even then, the meaning intended, is spelled out.

## 2.6.3 DOES THE WORD “INDEPENDENT” HAVE DIFFERENT MEANINGS FOR DIFFERENT USERS?

I believe that agency chairs, when using the word “independent” in relation to their own agencies, embrace in the word “independence” two ideas:

- (i) Security of tenure for themselves;
- (ii) The ability to exercise their own judgment.

Arguably, security of tenure can ensure a greater likelihood of independence of decision, but with great respect, I also believe that it is possible to be independent of mind without having security of tenure. What ought to be meant by the use of the phrase “independence” of administrative agencies, is the freedom to make an independent decision.

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What has happened, in my view as a consequence of the incorrect use of the word “independence” is that the user confuses independence of decision with accountability. Decisions of agencies should be arrived at independently, but this does not, and cannot mean, that agencies are unaccountable for their actions.

There is, in my view, no analogy between the independence of agencies and the independence of the courts. Yet, by the loose use of the word “independence”, an expectation surrounding the word has grown that is foreign to the real purpose of agencies in the first place. This expectation is inconsistent with the meaning of the word “agency” itself, at least in the sense that I use the word “agency”.

I, therefore, conclude that the word independent has a different meaning to different users, and without some explanation of the meaning intended, its use is incorrect, and at best, mischievous.

## 2.6.4 ARE ONTARIO AGENCIES “INDEPENDENT”?

In my opinion, Ontario agencies are not “independent”! Some of the 91 agencies clearly are not independent in any sense of the word, while some of the agencies have a greater duty to exercise independence of decision-making than others. Some agencies, on occasion, must make decisions within the limits of Ministerial or Government policy. For example, the Planning Act, RSO 1980, c. 379, provides that the Ontario Municipal Board “shall have regard” for various government policies or areas of interest.

Most agencies, on the other hand, are free to make decisions within their mandate, but are accountable to the Ministry, or the Government and the Legislature.

### Characteristics of Ontario Agencies

The following are some of the major characteristics of agencies in Ontario, which can hardly be said to be criteria of “independence”.

- The appointment process to agencies is such that a member may be appointed without review by or consultation with the agency or its chair.



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- The reappointment process is not built around security of tenure.
  - The agency structure is built upon some part-time and some full-time membership, but is not founded upon career-oriented service or process. Directive 6-2-3 of Management Board makes it clear that an appointment is for a maximum of three years, and that there *may* be *one* renewal.
  - The agency and the chairman in over 66% of the agencies have operating arrangements which clearly set out obligations as to management and reporting duties, which are totally inconsistent with the meaning of “independence” in the sense of independence of the judiciary.
  - Appointments to the staff of the agency and their classification are most often determined outside and not inside the agency.
  - The budget is likely included within the budget of the Ministry to which the agency reports, and the budget is not determined by the agency. Chairs of agencies are often not consulted upon the make-up of the budget and do not normally attend when the budget is presented to Management Board. The reason would seem to be that the agencies are not seen as being independent from the Ministry but for budgetary purposes, at least, as arms of the respective Ministries.
  - Most agencies cannot create their own rules of procedure without the approval of the Lieutenant Governor in Council or consultation with the Rules Committee of the *Statutory Powers Procedure Act*, Citation SPPA, R.S.O. 1980, c. 484.
  - Most agencies, if not all, but the Ombudsman, report to the Legislature through a Minister and can be called before Committees of the Legislature to account.
  - The Ombudsman has the authority to tell an agency that it has, in his opinion, come to a “wrong” decision, to ask it to change its decision, and if it does not do so, the agency can be called before a Committee of the Legislature and thence before the Legislature, itself, to account. There are also the constraints imposed by the Freedom of Information and Protection of Privacy Act, S.O. 1987, c.25 (FIPPA), the Provincial Auditor, the Legislative Committee on Agencies to mention only a few.
  - A number of agencies are chaired by and have members who are employed within the Ontario Government Public Service. These members can hardly be called “independent”, with years of service, and pensions and tenure at risk.
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- Where the mandating statute so provides, the Minister or the Cabinet can issue directives or instructions to agencies. There is also the constraint of government policy which I discuss later in this Report.
  - Any agency can be terminated by the Legislature and some can be terminated by an Order in Council.
  - Some agency decisions are subject to petitions to the Cabinet, which has the authority to substitute its own decision for that of the agency.

This list of considerations does not lead me to conclude that agencies in Ontario are “independent”. Certainly those are not the characteristics of “independent courts”. On the whole, I believe that the word “independent” is an inappropriate adjective to apply to Ontario agencies, and certainly not without the user defining the word so as not to mislead the audience.

## 2.6.5 CONCLUSIONS CONCERNING THE WORD “INDEPENDENCE”

I do not believe that agencies are or should be “independent” within the meaning of the word as it is used by so many observers. My own view is that we should speak of “independence of decision-making”. An agency makes its decisions at “arm’s length”. Throughout the process the agencies remain accountable. Some are so clearly controlled, even in their decision-making freedom, that one cannot continue to justify the use of the word “independent” to describe Ontario agencies.

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## APPENDIX 2-1

### AGENCIES, BOARDS AND COMMISSIONS (Arranged by Ministries)

#### AGRICULTURE & FOOD

Agricultural Council of Ontario  
Agricultural Licensing & Registration Review Board  
Agricultural Rehabilitation and Development Directorate  
Agricultural Research Institute of Ontario  
Alfred College of Agricultural Technology Advisory Committee on Diploma Education  
Beginning Farmer Assistance Program Review Committee  
Centralia College of Agricultural Technology Advisory Committee on Diploma Education  
Co-operative Loans Board of Ontario  
Crop Insurance Commission of Ontario  
Egg Fund Board  
Farm Income Stabilization Commission of Ontario  
Farm Products Appeal Tribunal  
Farm Products Marketing Board  
Farm Tax Rebate Appeal Board (formerly called Farm Tax Reduction Review Board)  
Grain Financial Protection Board  
Kemptville College of Agricultural Technology Advisory Committee on Diploma Education  
Live Stock Financial Protection Board  
Live Stock Medicines Advisory Committee  
Milk Commission of Ontario  
New Liskeard College of Agricultural Technology Advisory Committee on Diploma Education  
Ontario Agricultural Museum Advisory Board  
Ontario Agricultural Museum Artifacts Valuation Committee  
Ontario Apple Marketing Commission  
Ontario Cream Producers' Marketing Board  
Ontario Crop Insurance Arbitration Board  
Ontario Crop Introduction & Expansion Program Evaluation  
Ontario Drainage Tribunal

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Ontario Farm Machinery Board  
Ontario Food Terminal Board  
Ontario Grain Corn Council  
Ontario Junior Farmer Establishment Loan Corporation  
Ontario Milk Marketing Board  
Ontario Pork Industry Improvement Program Advisory Committee  
Ontario Stock Yards Board  
Processing-Vegetable Financial Protection Board  
Produce Arbitration Board  
Ridgetown College of Agricultural Technology Advisory Committee on Diploma Education  
Wolf Damage Assessment Board

## ATTORNEY GENERAL

Advisory Committee of the Public Trustee on Investments  
Assessment Review Board  
Board of Negotiation (Attorney General)  
Council of the Association of Professional Engineers of the Province of Ontario  
Council of the Ontario Association of Architects  
Criminal Injuries Compensation Board  
Finance Committee for the Investment of Court Funds  
Joint Practice Board  
Judicial Council for Provincial Judges  
Law Foundation of Ontario  
Law Society of Upper Canada  
Ontario Law Reform Commission  
Ontario Municipal Board  
Ontario Provincial Courts Committee  
Rules Committee of the Provincial Court (Civil Division)  
Rules Committee of the Provincial Court (Criminal Division)  
Rules Committee of the Provincial Court (Family Division)  
Rules Committee of the Provincial Offences Court  
Rules Committee of the Supreme and District Courts  
Statutory Powers and Procedures Rules Committee

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## WOMEN'S ISSUES

Ontario Status of Women Council (*See* Ontario Advisory Council on Women's Issues)

Ontario Advisory Council on Women's Issues

## CITIZENSHIP & CULTURE

Art Gallery of Ontario

CJRT-FM Inc.

Conservation Review Board

McMichael Canadian Collection

Ontario Advisory Council on Multiculturalism and Citizenship

Ontario Educational Communications Authority

Ontario Film Development Corporation

Ontario Heritage Foundation

Ontario Historical Studies Series Board of Trustees

Ontario Science Centre Board of Trustees

Province of Ontario Council for the Arts

Royal Botanical Gardens Board of Trustees

Royal Ontario Museum Board of Trustees

Science North Board of Trustees

## COLLEGES AND UNIVERSITIES

Academic Advisory Committee

College Relations Commission

Colleges of Applied Arts and Technology Board of Governors

Council of the Ontario College of Art

Guelph University Board of Governors

Lakehead University Board of Governors

Laurentian University Board of Governors

McMaster University Board of Governors

Ontario Council of Regents for Colleges of Applied Arts and Technology

Ontario Council on University Affairs

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Ontario Student Assistance Program Appeal board  
Ottawa University (Université d') Board of Governors  
Private Vocational School Review Board  
Ryerson Polytechnical Institute Board of Governors  
Selection Board (Ontario Graduate Scholarships)  
Sunnybrook Hospital Board of Trustees  
Toronto University Governing Council  
University Research Incentive Fund Selection Committee  
Waterloo University Board of Governors  
Western Ontario University of Govenors  
Wilfrid Laurier University Board of Governors  
Windsor University Board of Governors

## COMMUNITY AND SOCIAL SERVICES

Boards of Management for Homes for the Aged and Rest Homes  
Children's Services Review Board  
Custody Review Board  
District Welfare Administration Boards  
Medical Advisory Board - Family Benefits Act  
Medical Advisory Board - Vocational Rehabilitation Services  
Ontario Centre for the Prevention of Child Abuse  
Social Assistance Review Board  
Soldiers' Aid Commission

## CONSUMER AND COMMERCIAL RELATIONS

Board of Censors (*See* Ontario Film Review Board)  
Commercial Registration Appeal Tribunal  
Liquor Control Board of Ontario  
Liquor Licence Board  
Motor Vehicle Dealers Compensation Fund Board of Trustees  
Ontario Film Review Board

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Ontario Racing Commission  
Operating Engineers Board of Review  
Travel Industry Compensation Fund Board of Trustees

## CORRECTIONAL SERVICES

Board of Parole  
Custody Review Board  
Minister's Advisory Committee on Corrections

## DISABLED PERSONS

Ontario Advisory Council for Disabled Persons

## EDUCATION

Advisory Council on Special Education  
Council for Franco-Ontarian Education  
Education Relations Commission  
Languages of Instruction Commission of Ontario  
Ontario Institute for Studies in Education  
Ontario/Regional Special Education Tribunals  
Ontario Special Education (English)  
Provincial Schools Authority  
Teachers' Superannuation Commission

## ENERGY

Board of Valuation  
Ontario Energy Board  
Ontario Energy Corporation  
Ontario Hydro

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## ENVIRONMENT

Board of Negotiation (Environment)  
Environmental Appeal Board  
Environmental Assessment Board  
Environmental Compensation Corporation  
Farm Pollution Advisory Committee  
Hazardous Waste Listing Advisory Committee  
MISA Advisory Committee  
Ontario Environmental Assessment Advisory Committee  
Ontario Waste Management Corporation  
Pesticides Advisory Committee  
Recycling Advisory Committee

## FINANCIAL INSTITUTIONS

Commodity Futures Advisory Board  
Council of Registered Insurance Brokers of Ontario  
Financial Disclosure Advisory Board  
Ontario Securities Commission  
Ontario Share and Deposit Insurance Corporation Board of Directors  
Pension Commission of Ontario  
Toronto Futures Exchange Board of Directors  
Toronto Stock Exchange Board of Directors

## FRENCH LANGUAGE SERVICES

La Commission Des Services En Français de l'Ontario  
Ontario French Language Services Commission

## GOVERNMENT SERVICES

Ontario Land Corporation  
Provincial Judges Benefits Board  
Real Estate Advisory Board

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## MINISTRY OF HEALTH

Advisory Committee on Genetic Services  
Advisory Committee on Inborn Errors of Metabolism in Children  
Advisory Committee on Reproductive Care  
Advisory Medical Board (Ontario Mental Health Foundation)  
Alcoholism and Drug Addiction Research Foundation  
Assistive Devices Advisory Committee  
Board of Directors of Chiropractic  
Board of Directors of Drugless Therapy  
Board of Directors of Masseurs  
Board of Directors of Physiotherapy  
Board of Funeral Services  
Board of Ophthalmic Dispensers  
Board of Radiological Technicians  
Board of Regents of Chiropody  
Board of Visitors of Homewood Sanitarium, Guelph  
Chiropody Review Committee  
Chiropractic Review Committee  
Clarke Institute of Psychiatry  
Community Mental Health Clinic Board of Governors  
(formerly called Community Psychiatric Hospital Board of Governors)  
Council of the College of Nurses of Ontario  
Council of the College of Optometrists of Ontario  
Council of the College of Physicians and Surgeons of Ontario  
Council of the Ontario College of Pharmacists  
Council of the Royal College of Dental Surgeons of Ontario  
Dental Personnel Selection Committee  
Dentistry Review Committee  
Denture Therapists Appeal Board  
Drug Quality and Therapeutics Committee  
Funeral Services Review Board  
Governing Board of Dental Technicians  
Governing Board of Denture Therapists

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Healing Arts Radiation Protection Commission  
Health Care Systems Research Review Committee  
(formerly called Demonstration Model Grants Rev. Cttee.)  
Health Disciplines Board  
Health Facilities Appeal Board  
Health Protection Appeal Board  
Health Research Personnel Committee  
Health Services Appeal Board  
Hospital Appeal Board  
Joint Committee on Physicians' Compensation for Professional Services  
Laboratory Review Board  
Lieutenant Governor's Board of Review  
Medical Eligibility Committee  
Medical Personnel Selection Committee  
Medical Review Committee  
Nursing Homes Review Board  
Ontario Board of Examiners in Psychology  
Ontario Cancer Institute  
Ontario Cancer Treatment and Research Foundation  
Ontario Mental Health Foundation  
Optometry Review Committee  
Professional Services Management Committee  
Review Boards for Psychiatric Facilities  
Algoma District Health Council  
Brant District Health Council  
Cochrane District Health Council  
County of Simcoe District Health Council  
District Health Council of Eastern Ontario  
Durham Region District Health Council  
Essex County District Health Council  
Grey-Bruce District Health Council  
Haldimand-Norfolk District Health Council  
Haliburton, Kawartha and Pine Ridge District Health Council  
Halton District Health Council

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Hamilton-Wentworth District Health Council  
Kenora-Rainy River District Health Council  
Kent County District Health Council  
Kingston, Frontenac & Lennox & Addington District Health Council  
Lambton District Health Council  
Manitoulin-Sudbury District Health Council  
Metropolitan Toronto District Health Council  
Niagara District Health Council  
Ottawa-Carleton Regional District Health Council  
Peel District Health Council  
Rideau Valley District Health Council  
Thames Valley District Health Council  
Thunder Bay District Health Council  
Waterloo Region District Health Council  
Wellington-Dufferin District Health Council  
Alexandra Marine and General Hospital Board of Governors  
Belleville General Hospital Board of Governors  
Board of the Willett Hospital  
Board of Trustees of the Children's Hospital of Eastern Ontario  
Brantford General Hospital Board of Governors  
Brantwood Residential Development Centre Board of Directors  
Doctors' Hospital Board of Governors  
Greater Niagara General Hospital Board of Governors  
Hawkesbury & District General Hospital Board of Directors  
Humber Memorial Hospital Board of Directors  
James Bay General Hospital Board of Governors  
Kingston General Hospital Board of Governors  
Lady Minto Hospital Board of Governors  
Ongwanada Hospital Board of Governors  
Peterborough Civic Hospital Board of Governors  
Royal Victoria Hospital Board of Governors  
St. Mary's General Hospital Board of Directors  
St. Thomas-Elgin General Hospital Board of Governors  
Temiskaming Hospital Board of Governors

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Toronto East General and Orthopaedic Hospital Board of Governors  
Toronto Hospital Board of Trustees  
University Hospital (London Health Association Board of Trustees)  
Victoria Hospital Corporation Board of Directors  
West Park Hospital Board of Trustees  
Health Unit Boards (arranged alphabetically)

## HOUSING

Building Code Commission  
Building Industry Strategy Board  
Building Materials Evaluation Commission  
Ontario Housing Corporation Board of Directors  
Rent Review Hearings Board  
Residential Rental Standards Board  
Residential Tenancy Commission  
Housing Authorities (listed alphabetically)

## INDUSTRY TRADE & TECHNOLOGY

Eastern Ontario Development Corporation  
Innovation Ontario Corporation Board of Directors  
Northern Ontario Development Corporation  
Ontario Centre for Advanced Manufacturing  
Ontario Centre for Automotive Parts Technology  
Ontario Centre for Farm Machinery & Food Processing Technology  
Ontario Centre for Microelectronics  
Ontario Centre for Resource Machinery Technology  
Ontario Development Corporation  
Ontario International Corporation Board of Directors  
Ontario Research Foundation

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## INTERGOVERNMENTAL AFFAIRS

Province of Ontario Medal for Firefighters Bravery - Advisory Council

Province of Ontario Medal for Good Citizenship - Advisory Council

Province of Ontario Medal for Police Bravery - Advisory Council

## LABOUR

Advisory Council on Occupational Health and Occupational Safety

Agricultural Industry Advisory Committee

Grievance Settlement Board

Industrial Disease Standards Panel

Industrial Standards Advisory Committees

Labour Management Advisory Committee

Ontario Human Rights Commission

Ontario Labour Relations Board

Ontario Public Service Labour Relations Tribunal

Workers' Compensation Appeals Tribunal

Workers' Compensation Board

## MANAGEMENT BOARD

Civil Service Commission

Ontario Provincial Police Grievance Board

Ontario Provincial Police Negotiating Committee

Public Sector Pensions Advisory Board

Public Service Classification Rating Committee

Public Service Grievance Board

Public Service Superannuation Board

## MUNICIPAL AFFAIRS

Board of Management of the Guild

Canadian National Exhibition Association

Moosonee Development Area Board

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Niagara Escarpment Commission

Boards of Trustees for Improvement Districts (listed alphabetically)

## NATURAL RESOURCES

Algonquin Forestry Authority

Council of the Association of Ontario Land Surveyors

Crown Timber Boards of Examiners

Freshwater Fish Marketing Corporation

Game and Fish Hearing Board

Lake of the Woods Control Board

Land Surveyors Board of Examiners

Ontario Forestry Council

Ontario Geographic Names Board

Ontario Renewable Resource Research Review Board

Ottawa River Regulation Planning Board

Provincial Parks Council

Rabies Advisory Committee

Shoreline Management Advisory Council

Sturgeon River, Lake Nipissing, French River Watershed Management Advisory Board

Conservation Authorities (listed alphabetically)

## NORTHERN DEVELOPMENT & MINES

Geoscience Research Review Committee

Northern Development Councils (listed alphabetically)

Northern Development Councils Chairmen's Advisory Committee

Ontario Northland Transportation Commission

## OFFICE OF THE PREMIER

Premier's Advisory Committee on Executive Resources

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## SENIOR CITIZENS

Ontario Advisory Council on Senior Citizens

## SKILLS DEVELOPMENT

Apprenticeship and Tradesmen's Provincial Advisory Committees

## SOLICITOR GENERAL

Advisory Committee on Crime Prevention

Animal Care Review Board

Coroners' Council

Fire Code Commission

Ontario Police Arbitration Commission

Ontario Police Commission

Boards of Commissioners of Police (listed alphabetically)

## TOURISM AND RECREATION

Huronian Historical Advisory Council

Metro Toronto Convention Centre Corporation Board of Directors

Niagara Parks Commission

Old Fort William Advisory Committee

Ontario Lottery Corporation Board of Directors

Ontario Place Corporation Board of Directors

Ontario Sport Medicine and Safety Advisory Board

Ontario Trillium Foundation Board of Directors

Ottawa Congress Centre Board of Directors

St. Clair Parkway Commission

St. Lawrence Parks Commission

Thunder Bay Ski Jumps Limited Board of Directors

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## **TRANSPORTATION & COMMUNICATIONS**

Licence Suspension Appeal Board  
Niagara Falls Bridge Commission  
Ontario Highway Transport Board  
Ontario Telephone Development Corporation  
Ontario Telephone Service Commission  
Toronto Area Transit Operating Authority (GO Transit)

## **TREASURY & ECONOMICS**

Ontario Economic Council  
Ontario Municipal Employees Retirement Board  
Ontario Municipal Improvement Corporation  
Stadium Corporation of Ontario Limited Board of Directors

## **AD HOC**

Child Welfare Review Committee  
Boards of Reference (Education)  
Board of Inquiry (Metro Toronto Police Complaints Act)  
Commissions of Inquiry (Education)  
Board of Hospital Arbitration  
Boards of Arbitration  
Conciliation Boards and Mediators  
Employment Standards - Referees  
Industrial Inquiry Commissions  
Labour Relations Boards of Arbitration  
Ontario Human Rights Code - Boards of Inquiry  
Ontario Provincial Police Arbitration Committee

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## APPENDIX 2-2

### REGULATORY AGENCIES

All Regulatory Agencies are allocated to Schedule 1.

#### AGRICULTURE AND FOOD

Agricultural Licensing & Registration Review Board

Beginning Farmer Assistance Program Review Committee

Farm Products Appeal Tribunal

Farm Products Marketing Board

Farm Products Payment Board

Farm Tax Rebate Appeal Board

Grain Financial Protection Board

Livestock Financial Protection Board

Milk Commission of Ontario

Ontario Crop Insurance Arbitration Board

Ontario Drainage Tribunal

Ontario Family Farm Interest Rate Reduction Appeal Board

Ontario Farm Machinery Board

Potato Financial Protection Board

Processing Vegetable Financial Protection Board

Produce Arbitration Board

Provincial Decision Committee on the Farm Adjustment  
Assistance Board

Wolf Damage Assessment Board

#### ATTORNEY GENERAL

Assessment Review Board

Board of Negotiation

Criminal Injuries Compensation Board

Ontario Municipal Board

Statutory Powers Procedure Rules Committee

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## **CITIZENSHIP**

Ontario Human Rights Commission

## **COLLEGES AND UNIVERSITIES**

College Relations Commission

Ontario Student Assistance Program Appeal Board

Private Vocational School Review Board

## **COMMUNITY AND SOCIAL SERVICES**

Children's Services Review Board

Custody Review Board

Social Assistance Review Board

## **CONSUMER AND COMMERCIAL RELATIONS**

Commercial Registration Appeal Tribunal

Liquor Licence Board of Ontario

Ontario Film Review Board

Ontario Racing Commission

Operating Engineers - Board of Review

## **CORRECTIONAL SERVICES**

Ontario Board of Parole

## **CULTURE AND COMMUNICATIONS**

Conservation Review Board

Ontario Telephone Service Commission

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## EDUCATION

Education Relations Commission  
Languages of Instruction Commission of Ontario  
Ontario/Regional Special Education Tribunals

## ENERGY

Board of Valuation  
Ontario Energy Board

## ENVIRONMENT

Board of Negotiation  
Environmental Appeal Board  
Environmental Assessment Board  
Environmental Compensation Corporation

## FINANCIAL INSTITUTIONS

Ontario Automobile Insurance Board  
Ontario Securities Commission  
Pension Commission of Ontario

## HEALTH

Denture Therapists Appeal Board  
Funeral Services Review Board  
Health Disciplines Board  
Health Facilities Appeal Board  
Health Protection Appeal Board  
Health Services Appeal Board  
Hospital Appeal Board

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Laboratory Review Board  
Medical Eligibility Committee - Health Insurance  
Medical Review Committee - Health Insurance  
Nursing Homes Review Board  
Review Boards for Psychiatric Facilities  
Review Committee - Chiropody (Health Insurance)  
Review Committee - Chiropractic (Health Insurance)  
Review Committee - Dentistry (Health Insurance)  
Review Committee - Optometry (Health Insurance)  
Review Committee - Osteopathy (Health Insurance)

## **HOUSING**

Building Code Commission  
Building Materials Evaluation Commission  
Rent Review Hearings Board  
Residential Tenancy Commission

## **LABOUR**

Crown Employees Grievance Settlement Board  
Ontario Labour Relations Board  
Ontario Public Service Labour Relations Tribunal  
Pay Equity Commission  
Workers' Compensation Appeals Tribunal

## **MANAGEMENT BOARD OF CABINET**

Civil Service Commission  
Ontario Provincial Police Grievance Board  
Ontario Provincial Police Negotiating Committee  
Public Service Classification Rating Committee  
Public Service Grievance Board

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## **MUNICIPAL AFFAIRS**

Niagara Escarpment Commission

## **NATURAL RESOURCES**

Crown Timber Boards of Examiners

Game and Fish Hearing Board

Lake of the Woods Control Board

## **SOLICITOR GENERAL**

Animal Care Review Board

Fire Code Commission

Ontario Police Arbitration Commission

Ontario Police Commission

## **TRANSPORTATION**

Licence Suspension Appeal Board

Ontario Highway Transport Board

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## CHAPTER 3

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## CHAPTER 3

### DIFFERENCES BETWEEN AGENCIES AND COURTS

#### 3.0 INTRODUCTION

Before one can fully appreciate how an agency should or can conduct itself, one has to understand the rationale of agencies in general, why they are created and how they operate. This task began in Chapter Two, but cannot be completed if one does not also make a comparison between an agency and a court. It is by studying the differences between courts and agencies that we learn the most about agencies.

This Chapter is devoted to considering these differences. In passing, may I observe that the similarities between courts generally and agencies are more apparent than real. This Chapter attempts to lay the ground work for succeeding chapters which outline structures, authority and procedures which I believe should be available to agencies if they are to fulfil their mandates.

#### 3.1 WHAT ARE THE DIFFERENCES BETWEEN AGENCIES AND COURTS?

One often hears it said that there are important differences between agencies and courts, but one seldom sees the differences or their relative significance defined. I would like to observe that the differences as outlined are not in any order of priority.

1. ***The first major difference is a matter of perception.*** Nearly everyone has an idea of what a court is, who presides over it, where the court sits, what it does and what is expected of it. On the other hand, very few people know what agencies are, what they do, where they sit, who sits on them or what is expected of them. In fact, one of the major problems faced by all administrative agencies is that there is no real consensus about the rationale of agencies even among their creators. To confound the issue further, there is only one kind of “court”. On the other hand, there are many kinds of agencies, which have many kinds of names. There is a prototype for a court but none for an agency.

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2. *The second major difference is that the courts are independent politically while administrative agencies are not.* Often one will hear that the courts are “independent” and subject only to the Constitution and their own misbehaviour. They are unaccountable. When one looks at the legal and constitutional history of this country one can well conclude that the courts are both independent and unaccountable in the very correct sense of the words. Courts are not terminated by government, but agencies can be terminated. Judges do not come up for reappointment but agency members can be reappointed. No judge in Canada has ever been removed from judicial office under the removal procedure set out in sections 96 to 101 of the *Constitution Act, 1867*. Judges do not report to committees of Parliament or to the Legislature. Nor has a Committee of the Legislature or the Ombudsman ever demanded or even asked judges to reverse one of their decisions. Yet, Ontario agencies are commonly subjected to such requests. Courts do not have Memoranda of Understanding between them and Ministers of the Crown, but such Memoranda of Understanding exist between the majority of agencies and Ministries in Ontario. Agencies can be given instructions and directions by governments, but the courts cannot. The Cabinet can substitute its decision for an agency decision, but this is not the case with a court decision.

The nature of judicial independence was canvassed extensively by the Courts in three recent cases:

- (1) *Valente v. The Queen* [1985] 2 S.C.R. 673;.
- (2) *The Queen v. Beauregard* (1987) 30 D.L.R. (4th) 481 (S.C.C.); and,
- (3) *Reference Re Justices of the Peace Act; Re Currie and Niagara Escarpment Commission* (1985) 16 C.C.C. (3d) 193 (Ont. C.A.)

3. *Decisions of the courts are not reviewable by the Cabinet, by the Ombudsman or Committees of the Legislature, whereas many decisions of agencies are reviewable by Cabinet, the Ombudsman, Committees of the Legislature and in some cases by a Minister.*

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4. *The Freedom of Information and Protection of Privacy legislation as well as other legislation treats the courts and agencies quite differently.* In fact, the legislation exempts courts and judges, but does not exempt agencies or their members. This is a very important difference as discussions in this Report will later identify.
5. *The courts have made it clear that the courts do not make policy. I can state unequivocally that many administrative agencies frequently make policy and in a variety of ways.* The difficulty is, “what does one mean by the word policy”? All decisions are a statement of policy whether made by a court or an agency, and when strung together over time, can constitute a mountain of policy. Suffice it to say for the moment, courts do make policy. Their very decisions are a pronouncement of how they will deal with a matter in the future if the facts arise again. This is the very basis of *stare decisis* (the courts are bound by precedent). To me, at least the common law is “judge-made” policy. I am firm in my own mind, that agencies do make what amounts to public and legislative policy, and must do so in order to carry out their mandate. Furthermore, when the policy of an agency is accepted and sometimes adopted or tolerated, it can become government policy as well. The Legislature has the power to overturn any decision of any Ontario agency, but surely it is obvious that it has no such power in relation to a decision of a court. (However, a close reading of Bill 174 on Intervenor Funding recently introduced into the Legislature will disclose how the Legislature can neutralize a decision of the courts that it does not like).
6. *Most agencies sit on panel determinations while most judges sit alone.* Of the thousands of decisions which are made by courts each year, the majority by far, are made by judges sitting alone. When a judge sits alone, there is patently no need to develop procedures and rules about sitting on panels. On the other hand, agencies sit on panels, and rarely as single members. Accordingly, agencies must develop procedures which are appropriate for panel determination of matters, particularly where there is an expertise



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involved or new members have joined the agency. (See for example the issues involved in what I refer to later in this Report as the *Re Consolidated Bathurst Packaging Ltd. and International Woodworkers of America et al*, Div. Ct. (1985) 51 O.R. (2nd) 481 and C.A. (1987) 56O.R. (2d) 513 case).

There is no question that judges do occasionally sit on panels such as in the Court of Appeal or the Divisional Court, but judges sit as generalists and not as specialists. This fact requires an entirely different practice and procedure in terms of agency panel sittings.

7. *Courts are composed of generalists while agencies for the most part are composed of specialists.* Agency members may be appointed as specialists or they may become specialists because of the concentrated and specialist nature of the agency hearings. The decision of a generalist is dependent upon the evidence which is adduced before him while the decision of a specialist patently rests in part upon the expertise resident with the specialist. Thus the environment of knowledge in which the generalist and the specialist operates is very different. This difference itself leads to different needs for the two in their respective hearing processes.
8. *Courts adjudicate between winners and losers, and award costs to the winner against the loser as indemnity for “the suit improperly brought”, to use the words of the Court in a recent decision. Agencies for the most part deal with the public interest and not in suits between winners and losers. Often in agency hearings, no party will receive what he has requested. Costs in an agency matter mean something different from costs in a court because the whole process is different.*

This fundamental difference is important and accounts for a substantial number of differences in the powers and procedures between a court and an agency.

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9. *Courts do not monitor or regulate an industry or groups of citizens or employees, nor do they set standards within government or industry.* When a court decides a case, the judge likely will never see the parties again, or have to monitor the consequences of his judgment. As a matter of fact, the courts are not concerned with the effect or “fall-out” of their decisions. Agencies have to be concerned with the effect of their decisions.

When some agencies give a decision, it is a certainty that the same parties will reappear within months. *Many agencies have an on-going monitoring and regulating role.* In fact, the consequences of an agency decision may often be measured in hundreds of millions of dollars and thousands of jobs.

10. *The courts claim that they do not legislate, but they do legislate when they interpret or consider a statute.* When a court interprets a statute, it should be looking for the real intent of the Legislature as disclosed in the statute. Often the courts appear to apply their own values, arrived at over generations of adjudication, when interpreting legislation rather than applying the intent of the Legislature. In that sense then, the courts do legislate.

**Many agencies “legislate”.** Whether people are honest enough to admit to it or not is another matter. Unquestionably, the Automobile Insurance Board recently “legislated” the level of auto premiums and the quality of service in Ontario. It will also “regulate” to see that the revenue requirement of the insurance industry is “reasonable”, and if it is not, the Board can require the industry to re-attend. However no one would suggest that a court can approach that kind of “legislative” power.

11. *Courts do not “administer” on behalf of the government while this is the major mandate of most agencies.* Courts do not distribute grants or issue licenses and privileges, or supervise expenditures and monitor construction. Many agencies do exactly that and more.

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12. *Courts tend to deal with individual rights, while agencies deal primarily with the public interest.* The public interest is one of the major driving forces of agencies.
  13. *Courts most often deal retrospectively, but many agencies deal prospectively.* In fact, when agencies deal with the public good or the public interest they are for the most part dealing prospectively.
  14. *The courts do not encourage public participation and over hundreds of years have done much to close the door upon the general public.* Admittedly court practice is changing regarding who can and cannot appear before a court, but this change is very slow by agency standards.

Agencies meanwhile will go out of their way to permit and in many instances encourage public participation in their deliberations and decisions.

15. *Most matters brought before the courts can be settled before they get to the courts. On the other hand, many matters brought before agencies cannot be settled prior to review.* Some matters cannot even be settled upon consent when they get before the agency.

For example, if one wants to build a pipeline, or operate a transport service, or a liquor outlet, one must apply to an agency. Some agencies have the power to initiate a hearing and to make policy and decisions upon the simple ground that the agency sees a “public interest” at risk that should be addressed. No court has comparable authority.

16. *Courts are bound by the evidence presented to them. Many agencies are not bound by the evidence,* which is one of the reasons for the appointment of experts or specialists to agencies. This major difference both as to the weight of evidence and the onus makes the procedure of many agencies very different from that of the courts.

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Not only is there a different obligation in terms of the evidence, but some agencies may actively commission evidence and reports to be presented to them during a hearing. While this can be done by a judge, it is not common.

17. *Courts do not have a large technical staff to prepare a case for a hearing or to take an active role during the hearing*, including the commissioning of evidence, the calling of witnesses and the making of argument, but some agencies do just that.
18. *The courts are bound by what is called stare decisis (precedent). Agencies, on the other hand, are not bound by the decisions of other agencies or even by their own decisions.* This, in itself, demands different procedures and different ways of interpreting the law. When an agency is of the opinion that the application of some case law would injure the public interest, it must disregard or refuse to apply that case law.
19. *Many agencies have or apply rules of their own, and very often rules that are not recorded anywhere. The courts are bound by formal Rules of Civil Procedure.*

The Legislature has the power to mandate what rules and what procedures an agency is to follow, and such legislation will be respected by the courts unless the legislation is unconstitutional.

20. *The courts generally, with minor exceptions, allow the parties to take carriage of their litigation and the manner in which the parties present their case.* More often than not, in court, parties are represented by counsel who assert what are alleged to be procedures, and other rights, which are thought to be essential to protect their clients, without concern for the impact upon the public interest.



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*Quite a different procedure is often followed before administrative agencies. The issues and procedure to address those issues, including the order and method of presentation, may be set out by the agency and not left to counsel or the parties.* This often comes as a surprise to “court-trained” counsel. This procedure is often adopted because in many hearings the public interest must be considered which surmounts the interests of the parties present. In addition, in agency hearings some, many or all of the parties are without counsel. Many agencies have the duty to ensure that all interests are represented and protected.

This can be a major difference between court and agency hearings. Not only may the agency need to protect some interests which are not represented, but it must make sure that there is a balanced record, because the public interest transcends the entire procedure.

21. *Matters coming before the courts are dealt with in a formal fashion. Matters before agencies are handled in no predictable fashion.* Procedures vary from agency to agency, and the style is not only relatively informal, but quite open when compared with a court.

This variation in formality and openness is a major distinction between a court and an agency and can lead to the greatest variation in procedures between them.

22. *Generally speaking courts interpret legislation, while agencies implement legislation.* This distinction alone makes the role of the two institutions quite different and necessitates differences in approach.

23. *The courts are staffed by full-time appointees. Their members are trained in effect to become judges. Their appointments are not only secure, but they can remain fully employed until they reach the age of 75 and then retire with pensions.*

*On the other hand, many agencies are part-time with part-time members who have no security of tenure.* They can be removed with the stroke of a pen. What the Cabinet

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does by an Order In Council (OIC) it can undo by an OIC and just as quickly. Even full-time members have only a three year appointment and can be removed without notice or cause, by an OIC.

24. *Most agencies will, during the course of a week, sometimes in the same case and at the same time, operate in one or all three of the “court-recognized” modes of operation—administrative, legislative and adjudicative.* Courts do not.

The above constitute 24 differences between courts and agencies. These justify a conclusion that the institutions are quite distinct and require a different understanding and different practices.

Once one accepts that there are many differences between a court and an agency, one can use a broader brush to paint the needs, and the statutory powers, structures and procedures, which agencies require to operate effectively in carrying out their mandate.

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## CHAPTER 4

### McRUER AND ALL THAT - FROM DICEY TO TODAY

#### 4.0 INTRODUCTION

There are many definitions of “administrative law”. None are perfect, and all reflect the view of the beholder.

Administrative law, together with criminal law and constitutional law make up the body of public law which governs the relationship between individuals and the state.

A very simple definition of administrative law is that it is the body of rules and principles which governs the exercise of powers given by statute. Some of these rules and principles are created by judges and some by statute.

My purpose in writing this chapter is to trace the origins and development of administrative law generally and in Ontario in particular. One cannot appreciate the role of agencies in Ontario today or the role they can perform tomorrow unless one understands the attitude and perceptions of the law and statutes as they have evolved since 1900. The basic concern is how and on what basis to balance the interests of the individual and the state. An understanding of the deeper concepts and values is critical if the reader is to understand the current status of agencies, their need for greater powers and their need for greater coordination.

The first 75 years of this century firmly anchored administrative law, much more narrowly defined, upon the propositions of Dicey, the Rule of Law and the protection of individuals rights, in the belief that society as a whole, was protected if individual rights were protected.

Dicey was a leading late 19th, early 20th Century British constitutional lawyer whose analysis of British constitutional theory profoundly influenced 20th Century legal thought.

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In the mid-1960's many of Dicey's views were adopted by Chief Justice McRuer in his Inquiry into Civil Rights in the province of Ontario.

The last quarter of this century saw the rethinking of Dicey, McRuer, the Rule of Law and the emerging concept that the public interest is not always best protected merely because the individual has been protected.

Many now believe that some adjustments have to be made, so that we can employ newer and better procedures and concepts, which will enable us to realize the appropriate balance between the individual and society.

Dicey saw protection for the former as protection for the latter. By today's standards it is widely held that Dicey was not correct and that the McRuer Report may have gone too far in its reflection of some of Dicey's theories.

Having said that, let us now look at administrative law through the eyes of a number of different viewers. Such an examination is essential to understand where we are today and how we got here.



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## 4.1 SIX VIEWS OF ADMINISTRATIVE LAW

There are in my opinion, six distinct views or descriptions of administrative law, each of which has influenced the development of administrative law in Ontario since 1945.

- (i) **The Dicey-McRuer concept of identifying the law with the individual and realizing that goal, through judges;**
- (ii) **The Willis concept of Functionalism;**
- (iii) **The Arthurs concept of Pluralism;**
- (iv) **The Laskin-Dickson concept of Judicial Deference;**
- (v) **The effect of the Charter, and**
- (vi) **The Canada Law Reform Commission view.**

I shall discuss each of these views in the first part of this chapter. In the second part of the chapter, I shall propose my view upon which I base specific recommendations to enable agencies to operate more efficiently and effectively.

### 4.1.1 THE DICEY-McRUER CONCEPT OF THE RULE OF LAW

In his *Introduction to the Study of the Law of the Constitution* published in 1885 Dicey noted that the two dominant features of English political institutions since the Norman Conquest, were the supremacy of the central government and the supremacy of the law. The first feature of royal supremacy, evolved, as Dicey explained, into the doctrine of the Supremacy of Parliament.

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The second feature, the supremacy of the law, dates from about the reign of Henry VI. Whatever the origin of the term “The Rule of Law”, it was Dicey who gave the term a meaning which was consistent with his *laissez faire* views. For Dicey, the term included two major concepts:

- (i) “We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”
- (ii) “We mean in the second place...not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.” (Dicey, *The Law of the Constitution*, c.4)

A common thread runs through the concepts stated by Dicey. Whatever the law may be, it is only meaningful, if made by judges and in the courts. The reader should also note that Dicey is speaking of the two major components of today's definition of administrative law, namely, the procedures followed in making decisions, and the concepts upon which decisions are based. For Dicey the only acceptable procedure was “court procedure”. The only acceptable values were the “Rule of Law” as interpreted by the courts.

These two components guarantee the protection of individual rights under the English constitution. This meant that inferior law, such as the law administered by agencies, would require extensive supervision and control by the courts. Even statutes of Parliament, Dicey accepted only reluctantly, because they were not proclamations of the courts. Dicey has never satisfied many observers that he could reconcile the Supremacy of Parliament with the inferiority of statutes and the operation of agencies which, as creatures of Parliament, implement those statutes.

Dicey's views as adjusted, became firmly embedded in the law of Ontario through the medium of Chief Justice McRuer. He was commissioned by Order in Council made under *The Public Inquiries Act* in May 1964:

“To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario for the purpose of determining

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how far there may be unjustified encroachment on those freedoms, rights and liberties by the Legislature, the Government, its officers and servants, divisions of Provincial Public Service, boards, commissions, committees, other emanations of government or bodies exercising authority under or administering the laws in Ontario.”

This mandate was in response to the perceived threat to the public interest posed by ungoverned government. McRuer was asked to respond to this interest, and he did so, in his Report. In fact, McRuer was a prisoner of his own terms of reference. McRuer assumed that the public interest was identical with the protection of the individual.

However, many agency decisions must be founded upon the public interest, which may be in direct conflict with private interests. Yet in determining the public interest, the agencies are expected to employ McRuer “judge-decreed” confrontational practices and procedures.

McRuer adopted Dicey’s view in the following sense:

“...the Rule of Law should be the paramount aim of every sound legal system as a protection against any disposition on the part of those with power to exercise it arbitrarily or capriciously.” (McRuer Report, Volume 1, p. 58)

**No one has any difficulty in accepting the above statement, so long as one does not read into it that private rights are necessarily synonymous with the public good.** Not only that, but McRuer took those statements as a basis for the judicialization of administrative powers and procedures in Ontario, which in my opinion is no longer appropriate.

What I call the Dicey-McRuer view suggests that the evil to be avoided is the encroachment of individual rights by arbitrary executive action.

The solution McRuer proposed was the only one he knew: discretion should be exercised in a court-like fashion. McRuer’s and Dicey’s view was that the individual interest is best protected by judges, but if decisions are to be made by people who are not judges, then the procedures must at least adhere to judicial or court-like practices.

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With respect to “procedure”, the weakness of the McRuer approach was in the application of Rule of Law concepts with their attendant formalism and judicial overtones, to all forms of administrative decision making. In decision making there must be procedure that is predictable, effective, acceptable and “fair”. The procedure need not be and, in many circumstances, ought not to be “judicial”.

McRuer did make some useful recommendations. He clarified and simplified the manner in which applications could be brought for judicial review. This led to the enactment of the *Judicial Review Procedure Act (JRPA)*, R.S.O. 1980, c. 224. This simplified procedure replaced the prerogative writs of *certiorari*, *prohibition*, and *mandamus*. Prior to the enactment of the JRPA, it had been necessary for the courts to categorize the decision from which relief was sought, into categories which were amenable to one or another of these writs.

McRuer also treated the operation of agencies as if they were all “tribunals”, which of course, they are not. He recommended minimum rules, largely court-like in form and content, for the guidance of “tribunals”. These minimum rules were set out in the *Statutory Powers Procedure Act (SPPA)*. The SPPA also established a Statutory Powers Procedure Rules Committee to review rules and to maintain a continuous review of the practices, procedures and rules of tribunals.

Extensive amendments to virtually every Ontario statute incorporating McRuer’s views were enacted in the early 1970’s. McRuer was successful in catching the mood of the legislators of his day. He was successful in solving the problem as he perceived it and as it was set out in the terms of reference. However, he was less successful in identifying the problems which lay beyond the assumptions handed to him in his terms of reference. McRuer failed to give any weight to the array of social, economic and welfare provisions enacted by legislatures. He encouraged the judicialization of the administration of Ontario.

Stating the issue in civil rights terms, McRuer established the high water mark of the judicialization of the administrative process. It is this identification of the public interest with the rights of individuals and the insistence on a judicial model as the sole procedure



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available to resolve the conflicts between the private interest and the public interest, which lies at the root of many of the problems faced by agencies today.

The orientation of the McRuer Report and the legislation which followed it, necessitate that we look again at the authority which ought to be contained in the *SPPA* and some of the structures which determine the efficiency, efficacy and fairness of the 91 regulatory agencies of this Province.

#### 4.1.2 THE WILLIS CONCEPT OF FUNCTIONALISM

The failure of McRuer to consider any approach to administrative law other than the judicial approach was regrettable. Much of the information and experience which he needed to establish a better theoretical basis for his report, and to test his assumptions was readily available in published literature. I have taken as an example of the state of academic criticism, the writings of Professor John Willis.

In his 1935 article in the University of Toronto Law Journal titled *Three Approaches to Administrative Law: The Judicial, The Conceptual, and The Functional*, Willis observed the growing hostility of the courts to the administrative process and as a result, he foresaw and rejected the judicial approach, which was subsequently to be adopted by McRuer. Willis described the judicial and conceptual approaches and then described the functional approach as follows (at p. 75):

“The problem put is, how shall the powers of government be divided up? The problem is neither one of law nor of formal logic, but of expediency. The functional approach examines, first, the existing functions of existing governmental bodies in order to discover what kind of work each has in the past done best, and assigns the new work to the body which experience has shown best fitted to perform work of that type. If there is no such body, a new one is created ad hoc”.

The Willis’ functional approach is pragmatic, practical and nonjudicial. Regarding “procedure” issues he says, ‘there are serious social and economic concerns to be addressed, fix them the best way you can. Do not get enmeshed in judicial or court-like

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procedures as a way of solving problems which can be solved by nonjudicial means.’

Willis did not perceive the problem to be how to protect the individual from arbitrary executive action. He saw the public interest in larger terms. Willis understood that executive action was required in the public interest.

### 4.1.3 THE ARTHURS CONCEPT OF PLURALISM

In his text *‘Without the Law’ Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press 1985) and in his article *Rethinking Administrative Law: A Slightly Dicey Business* (1978)<sup>17</sup> Osgoode Hall L.J.1, Professor Arthurs noted the “...emotive and symbolic significance...” of this “...legal-cultural artifact...” [i.e.The Rule of Law]. He described an alternative approach or model (at p.22).

“...An alternative approach would begin with the hypothesis that our legal system is pluralistic, that ‘ordinary’ law is either undefinable or, if it is defined as common law, it enjoys no preferred constitutional position. From this would flow several propositions. First, statutes lead a life of their own, rather than a parasitic and contingent existence within the body of the common law. Second, as far as possible, *they are to be enforced by judges in the spirit in which they were enacted, rather than in the general spirit of common law*. Third, in the event of conflict between a statute and a common law rule, the former should prevail, if not on the ground of parliamentary sovereignty *per se*, then because a statute which is later in time and more specific in intent, is more likely to integrate sensibly with contemporary legislation than a rule whose origins are ancient and whose power is essentially analogical.” [italics mine]

It is evident that this is a description of a social system and not a legal system in a strict sense. In my opinion the great strength of the “pluralist” analysis is that it more accurately reflects the way in which society appears to operate than does Dicey’s Rule of Law approach. If we consider the “procedure” aspect, it is easy to discern that many different groups and organizations have their own effective, predictable, reasonable and fair way of resolving disputes and making decisions, without judges interfering.

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Problems arise when the courts apply their own judicial standards to the process applied by other groups and organizations such as administrative agencies, without having a working understanding about how the system works or the ramifications of the aftermath of their decisions. Judges can walk away from their decisions for a host of reasons, amongst which is the fact that they have no on-going relationship with the parties or groups that come before them, and also because the public interest is not a constant in matters before them.

#### 4.1.4 THE LASKIN-DICKSON CONCEPT OF JUDICIAL DEFERENCE

A fourth view of administrative law can be discerned by examining the “policy” adopted by the courts in the last ten years towards the decisions of agencies. This “policy” has been described as one of “curial deference”. The phrase means that the courts will not overturn an agency decision unless the agency decision is “.. patently unreasonable.”

The development of curial deference can be traced in labour law cases from 1945 to the late 1970’s. This period can be divided into two parts.

The first period, I call the period of confrontation. The second, I call the period of coexistence. As I have described, from 1945 to the late 1970’s, the attitude of the courts towards the decisions and activities of agencies was one of confrontation and hostility. In the mid-to-late 1970’s, the attitude changed. I take as a precise date the year 1979, the year the Supreme Court of Canada in *CUPE v New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, set out the policy of “curial deference”. This meant that the Court was prepared to defer to agency decisions. This policy paralleled that adopted by USA courts towards agency decisions.

The courts, first under the leadership of Chief Justice Laskin and now under the leadership of Chief Justice Dickson extended to agencies greater latitude to determine matters of policy and law without interference or second guessing by the courts.

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In the early years, the courts were motivated by the same values and assumptions which had so deeply affected *McRuer*. This meant that the courts were ready to intervene and to overturn agency decisions.

I cite as an example, two labour law cases (separated by about 10 years) which went in opposite directions, although the Court in both cases was faced with the same proposition.

In 1970, in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796* [1970] S.C.R. 425, the Supreme Court of Canada under Chief Justice Cartwright had little difficulty overruling the Ontario Labour Relations Board (OLRB) on the sensitive political issue of defining union membership. (An issue a court should try to avoid.) In so finding, the Supreme Court also overruled the Ontario Court of Appeal. Laskin, (then a Justice of the Court of Appeal of Ontario, later to become Chief Justice of Canada) had a more sensitive understanding than Cartwright CJC, of the nature of the OLRB's mandate and the difficulties of its task.

In the Court of Appeal decision (reported [1969] 1 O.R. 412), Laskin stated (p. 417):

“My construction of the relevant legislative provisions leaves me in no doubt that the Board was invested with jurisdiction to decide conclusively, *inter alia*, the question of union membership, and to make a certification order in the light of that decision. The provisions in question do not predicate the Board's certification function on an ultimate Court determination of the meaning of union membership.”

Almost ten years later, the Supreme Court of Canada (SCC) with Laskin as Chief Justice abandoned and distinguished the decision of Cartwright CJC in the *Metropolitan Life* decision. In CUPE curial deference was born. Dickson, now Chief Justice, stated: “The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations...”

“The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the



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twin purposes of the legislation are to be met....not only would the Board not be required to be *correct* in its interpretation, but one would think that the Board was entitled to err and any such error would be protected from review by the privative clause.” [italics mine] (p. 236)

“Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?” (p. 237)

“At a minimum, the Board’s interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal.” (p. 242)

In *Hughes Boat Works Incorporated and Automobile Workers of America* (1980) 26 O.R.(2d) 240, Justice Reid added significantly to an understanding of “curial deference”. He stated (p. 431):

“In characterizing the question in terms of *reasonableness* of interpretation rather than *correctness* Dickson, J. seems to me to be establishing a new, and to me desirable, relationship between the courts and the tribunals. This is a concession to the relevance of a tribunal’s experience and expertise....”

“It is because a tribunal may be seen to have acquired an expertise in the area of its responsibility and sensitivity to the consequences of a particular interpretation of legislation that affects that area that *reasonableness*, rather than *correctness* becomes an appropriate criterion.”

“It follows that an interpretation may be seen to be *reasonable* notwithstanding that it might not be one that the reviewing court would have made....” [italics mine]

See also the decision of Mr Justice Blair in *Re Ontario Public Service Employees Union and Forer et al* (1986) 52 O.R. (2d) 705. This decision contains an excellent review of the development of “curial deference”.

I caution the reader to remember that the “policy” of judicial deference is the creature of the courts and it is called a “policy” only.

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Chief Justice Dickson in *Fraser and Public Service Staff Relations Board* [1985] 2 S.C.R.455 stated (at p.464):

“A restrained approach to disturbing the decisions of specialized administrative tribunals, particularly in the context of labour relations is essential if the courts are to respect the intentions and policies of Parliament...”

However this was qualified by the following statement (pp. 464-5):

“A reviewing court...should not interfere with the decision of a statutory decision-maker in a case such as this unless the statutory decision-maker makes a mistake of law, such as addressing his or her mind to the wrong question, applying the wrong principle, failing to apply a principle he or she should have applied, or incorrectly applying a legal principle.”

What the courts give, they can also take away.

#### 4.1.5 THE VIEW FROM THE CHARTER

The enactment of the Charter of Rights and Freedoms (in 1981) confirmed the paramount position of the judiciary in the Canadian political system.

Arthurs describes the effect of charters in *‘Without the Law’* on page 190:

“Bills or charters of rights are, in a sense, the ultimate expression of legal centralism. All law, all political behaviour, all economic and social policy is ultimately to be measured against a single fixed constitutional standard whose interpretation depends upon professional advocacy and formal adjudication.”

The Charter provides legal sanctions for what prior to the Charter would have been sanctioned by political action. “Law” in terms of the Charter is paramount. The “Law” in relation to the Charter will be as interpreted by the Courts, a huge responsibility which comes close to a blank cheque to “legislate”.

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I remind the reader of the study prepared for the joint annual meeting of the Canadian Political Science Association and the Canadian Law and Society Association in June 1989. It concludes that legislation enacted by the provinces has been struck down more frequently than federal legislation. The Charter is influencing legislative policy and is limiting both federal and provincial legislative authority.

I reiterate. I have no difficulty with the courts remaining the guardians of fundamental constitutional values. I have difficulty when those values are interpreted on the basis of purely judicial views of those values.

The position taken by the courts in relation to the Charter is only now evolving and it is premature to hazard a guess on how far the courts will involve themselves in areas of government which they have previously foresworn such as “policy”, “legislating”, and “administering”. It is likely that the Charter will not materially alter how agencies in Ontario operate or decisions to be made by agencies. It seems clear that most agencies are deemed to be “courts of competent jurisdiction” in Ontario and within the Charter. Agencies have the duty to deal with Charter matters when they come before them in the course of exercising their jurisdiction and agencies must be “correct” in their decisions as to the constitutionality of a statute before them. This means that there cannot be curial deference by the courts towards agency decisions dealing with constitutionality.

Where the Charter is the road-map for the court, it is likely that the courts will continue to apply their own values as to what constitutes the undefinable benchmark, the “Rule of Law”.

#### **4.1.6 CANADA LAW REFORM COMMISSION—MODERN ADMINISTRATIVE LAW**

The Canada Law Reform Commission in a recent consultation paper examined the spectrum of government activity and concluded that there are significant gaps in the spectrum providing effective legal protection for individuals. In theory, government action is subject, broadly speaking, to two types of review or control. One is political. The second is judicial.

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The Commission observes that the traditional political control exerted over government action, that is ministerial responsibility for actions of government officials, is no longer effective. Judicial review does not apply to all types of government action and in any event is prohibitively expensive. The Commission suggests that there is a range of activity which it calls “administrative functioning” that “ought to be framed by rules of law”. The Canada Law Reform Commission study paper goes far beyond the problems peculiar to agencies so I will not dwell further on this valuable paper. However I observe that “Rule of Law” concepts die very hard and I would discourage the adoption of judicial or court-like rules as a basis for “administrative functioning”.



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## 4.2 BALANCING PUBLIC AND PRIVATE INTERESTS

I have set out six views of administrative law. I do not for a moment suggest that there are not others, or that I have stated these views as other observers would necessarily see them. I should also like to observe that as these periods of thought or perception moved down the page of time, many social, political and economic cross-currents moved across the same page, which attracted their own legislative responses. These cross-currents took place spasmodically in the form of action and reaction in the field of immigration, radio and television policy, rent control, securities legislation, drug and product protection, energy deregulation, and labour relations to name but a few.

The picture which emerges is one of continuous change. Development in one field affected other fields. Legislation enacted in reaction to change in one field caused reaction in other fields. The solutions found for one set of problems in one sector influenced the solutions found in other sectors.

I have commented upon the development of the policy of curial deference in the field of labour law. That policy has been extended to agencies in other fields as well. Various government and agency policies and procedures are used to define, shape, and protect what is perceived to be the public interest. Thus one may find increasing regulation of health standards accompanied by decreasing regulation of highway transport. In health, the public interest is perceived to be best protected by close monitoring and surveillance. In transport, the public interest is now perceived to be best protected through deregulation and the open market.

One may recall that this is a complete reversal of what was perceived to be in the public interest only a few years ago, when health was a matter of private enterprise and charity.

Transport is now being removed from regulation because public policy and the public interest dictate that the best protection for the public in terms of transport, is open competition rather than closed regulation.

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One can see that what constitutes the public interest will shift from time to time towards and away from the individual and towards and away from the group.

While observing the six views which I have outlined, I have become convinced that none of the six achieves the goals that I believe are consistent with the needs of decision-making by agencies today. Now I would like to develop a different view of administrative law, which forms the base for many of the recommendations which are contained in Chapters Eight and Nine, and as well reflects better upon the duty of the Government of Ontario to be protective of the public interest of this Province.

In setting forth this view of administrative law, I remind the reader of the point which I expressed in the introduction to this Chapter, namely, that *administrative law* is about the *procedures* and the *concepts* by which the state and individual interests are balanced. The following are my observations about the elements of this balance.

### **FIRST - "PROCEDURE OR PROCESS"**

Sometimes I use the word "process" and sometimes I use the word "procedure", but I intend both words to denote the manner or way in which things are done or not done.

I have observed in our parliamentary system an underlying sense of process. There is a consensus that decisions, political, legal or administrative, should be decided in accordance with a process which is predictable, open, fair, ordered and reasonably responsive to the interests affected. As I have observed, "process" should not necessarily be the processes and procedures which were invented by the courts for their use, no matter how well they may have served the courts.

The very purpose of agencies, and the intent of the Legislature, in creating them, is vastly different from the purposes of the courts. In fact, one of the preeminent purposes for the creation of agencies was to create a forum for public participation and decision, removed from, and not dependent upon the courts.

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I submit, there are many ways in which to secure fairness and due process without having to depend upon the procedures of the courts.

## **SECOND - "CONCEPT OR VALUES"**

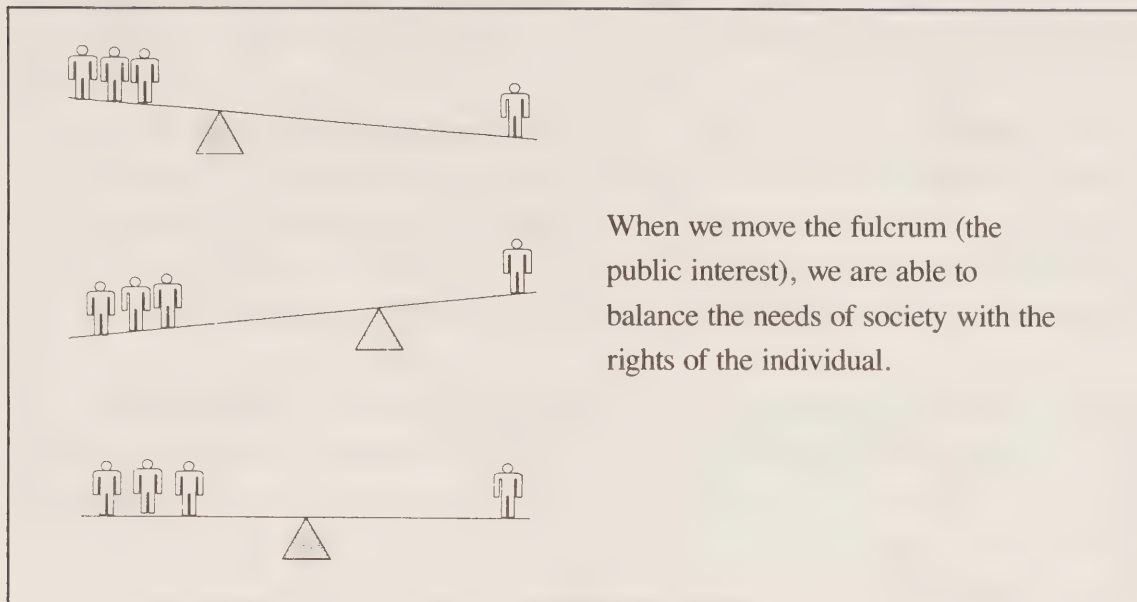
The basic values of our society exist even if unarticulated. These basic values in administrative hearings involve implementation of the values or concepts the Legislature was trying to achieve. Whether this is a silent value or an expressed value, it can as well be called a "legal" value, in the broadest sense of the word. A legal value is an abstract concept which does not necessarily mean that it is derived from the judiciary, but rather that there is a morally sound purpose, a decency, openness, fairness and a reasonable response to the need for the value.

## **THIRD - BALANCING INTERESTS**

I have observed in my experience in law, politics, agency and business circles, an understanding common to all, that for society to function, there must be a balancing of interests. Our "legal", political, and business systems are all predicated on this concept. It is explicit in the Charter. It is apparent in political life. It is apparent in every day life, just as it is in the mandate of administrative agencies. Governments legislate for the group and the public, often, if not more often, than for the individual.

A major difficulty which agencies face, over and over again, is where to place the fulcrum (the public interest) beneath the "see-saw" upon which are balanced groups versus private interests. With the aid of several small drawings I would like to illustrate how, by moving the "fulcrum" (the public interest), one can balance the interests of the individual with those of the group.

Where the public interest (the fulcrum) is placed beneath the balancing arm of decision-making will determine the proper relationship between the protection given the individual as opposed to the protection given the public.



#### **FOURTH - INDIVIDUAL RIGHTS AND INTERESTS**

The goal of preserving and enhancing the rights and interests of individuals is central to the Rule of Law, McRuer's reforms and the Charter. This is a basic value but it is not the only value. Much of our legislation and many of our agency decisions are directed towards treatment of society and groups as a whole. The individual obtains in those cases his protection as a member of the society or group and not as an individual. To me, this says that under some circumstances Dicey-McRuer have it reversed. No rule can be said to be a "rule" of law or physics, if it is wrong some of the time.

#### **FIFTH - PUBLIC INTEREST**

I have observed much confusion surrounding the term "public interest". Administrative law rests on the imprecise balance of individual interests and the public interest.



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Now I speak of the “public interest” in the broadest sense. This concept is the common thread running through the several views of administrative law noted above. The “public interest” has been defined in many places and under many circumstances and is referred to, without definition, in over 100 statutes in Canadian legislation. The word must be specifically interpreted whenever it is specifically used in a statute. Generally speaking however, the “public interest”, which is at the base of administrative law and agency decision-making, can be said to be what is “good”, “beneficial” and in the “best” interests of the society for which the particular legislation was designed.

On occasion, the courts will refer to the “public interest”. See *Re Federation of Women Teacher’s Associations of Ontario and Ontario Human Rights Commission et al* (1989) 67 O.R. (2d) 492 where the Divisional Court referred an application for a stay in proceedings before a Board of Inquiry of the O.H.R.C. on the basis that a stay would not be in the “public interest”.

Dicey and McRuer assumed, and equated, the protection of private rights with the public interest. The threat to the public interest came from unrestricted bureaucratic action, and not from individual behaviour.

Willis saw the public interest in different terms. He saw the need for social and regulatory programs (which would inevitably affect private rights) to protect the public from economic or social ills. Similarly in wartime or in other emergencies, the predominance of the public interest over individual rights is, I judge, within the “Rule of Law”. In effect the “Rule of Law” says that the “Rule of Law” can be suspended “in the public interest”.

We are left with the Rule of Law, which represents the basic assumption upon which administrative activity rests; that is to say, all social, economic and regulatory programs are to be administered, decided upon, and enforced in accordance with and within a legal framework. Power is to be exercised, wealth redistributed, individuals protected or adversely affected, only in accordance with the law.

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Let me offer two recent examples about the way the public and private interests were weighed.

The first case, *Consolidated Bathurst* is an example about “procedure” issues. While the second, *Re Coates et al and Registrar of Motor Vehicle Dealers and Salesmen*, (1989) 65 O.R. (2d) 526, is an example about “concept” issues.

The reader will recall that in the *Consolidated Bathurst* case, the Divisional Court in a two to one decision, set aside a decision of the Ontario Labour Relations Board on the basis that the procedure by which the decision was arrived at, was improper. The error the Board had made, according to the majority, was to review the proposed decision in the presence of members of the Board, who had not heard the evidence.

The Divisional Court held that consultation was improper, on the basis that “he who hears must decide”. This was a classic case of importing into agency proceedings a standard long used by the courts, as part of the Rule of Law, but which was inappropriate for the work of that agency, and in fact most agencies.

Interestingly enough, the Divisional Court approached the same kind of matter, again in a divided way, in a case in the summer of 1988, entitled *Spring and the Law Society of Upper Canada*, (1988) 64 O.R. (2d) 720. This time the Court went in the opposite direction to that of the *Consolidated Bathurst* decision.

In both cases the Divisional Court categorized the issue as a “process” issue to be measured against the standards of process which the Court itself would apply in the same situation. (Note that the policy issues canvassed by the Board in the *Consolidated Bathurst* case were not issues of the type assigned to the courts. The real issue in the matter heard by the Board was “policy” but the court turned the case into a “procedural” issue by trying to force its way of doing things upon a Board which simply could not operate that way.)

The Court of Appeal reversed the Divisional Court in the *Consolidated Bathurst* case on the basis that the procedure was acceptable within the context of labour relations and the need

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for consistent policy in Board decisions. Mr. Justice Cory acknowledged the specialized nature of the Board and stated (at pp.516-7):

“The principle that he who hears must decide is not really in issue on the facts presented to the court in this case. The material makes it clear that during the full Board discussion no new evidence was put forward. Rather, the facts as set out in the draft reasons were accepted. Nor were there any different ideas put forward from those discussed before the hearing panel. Lastly, there is no suggestion that anyone but the hearing panel participated in the final decision.”

“The discussion by the full Board in this case did not amount to a denial of natural justice. Instead, it was an exercise of common sense whereby the significance and effect of a decision was discussed with other experts in the field. The discussion by other members of the Board did not amount to their participation in the final decision. It was no more than an amplification of the research of the hearing panel carried out before they delivered their decision. It was a step taken pursuant to the statutory mandate of the Board to further harmonious relations between employers and employees. This goal was sought to be achieved by a careful consideration of the implications of their decision. Further, in the interests of uniformity of their rulings, it was helpful for all members of the Board to be aware of the problem and its eventual resolution by the hearing panel.”

In my opinion the court could have gone a lot further.

The Ontario Labour Relations Board established and administered policy in a broad sense and applied that policy to specific cases. In my opinion, the Court of Appeal ought not to have assessed the behaviour of the Board by court standards, even if the Board in the result, met those standards. The Court should have asked, “Does the conduct of the Board meet labour relations standards, based on evidence of labour relations practices and procedures?” It should not have embarked on a review of the Board’s conduct based on judicial standards. The only occasion for court intervention would be in those circumstances where Board behaviour was sufficiently unfair as to offend the sense of process. The point is a subtle one.

The results obtained under this broader policy may look the same as the results obtained under the policy of judicial deference, but there is a very real difference. If the courts apply the broader test, the effect will be to dejudicialize the operations of boards without



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impairing substantive fairness. The times justify the courts extending the policy of deference beyond judicial standards. There should be appropriate procedures. This is what is meant by the Rule of Law. The process need not be, and in many cases, ought not be, a judicial process.

The second case is illustrative not of the “procedure” aspect but rather of the “concept” aspect. It is a decision of the Ontario Divisional Court. I shall refer to this case again elsewhere in my Report. The case is *Re Coates*. Coates was the sole shareholder and president of a company named Centennial. Both Coates and his company were licensed as car dealers under the *Motor Vehicle Dealers Act*, R.S.O. 1980, c. 299.

In 1985 both Coates and the company were charged with odometer tampering under the federal *Weights and Measures Act*. **The company pleaded guilty.** Charges against Coates were dropped. Shortly thereafter, the Registrar under the Motor Vehicle Dealers Act gave notice of his intention to propose the licences of both the company and Coates be revoked. Coates and the company requested a hearing before the Commercial Registration Appeals Tribunal (CRAT). The Registrar based his proposal on Section 5 of the Act.

Section 5 states:

“5(1) An applicant is entitled to registration by the Registrar except where,

- a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
- c) the applicant is a corporation and
  - i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
  - ii) the past conduct of its officers or directors affords reasonable grounds for belief that its



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business will not be carried on in accordance with law and with integrity and honesty; or

d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.”

The Commercial Registration Appeal Tribunal (CRAT) ordered the revocation of Coates’ licence on the basis that the conviction of the company created a presumption that Coates was personally involved in the acts constituting the company’s wrongdoing because he controlled the company. CRAT relied on section 5 (1) (b) in so holding.

CRAT then ordered the revocation of the company’s licence on the basis of section 5 (1) (c) (ii). In CRAT’s view, once Coates was presumed to have known of the wrongdoing, it followed that his conduct as an officer of the company was unacceptable from the point of view of protecting the public interest. This was not a criminal trial, it was a matter of an agency charged with protecting the public interest, trying to do so, by public interest standards.

The Divisional Court reversed CRAT’s decision.

Mr. Justice Reid held that there was no basis in law for the presumption upon which the tribunal relied respecting Coates. In addition, the Court held that once it had been determined that there was no evidence against Coates personally the revocation of the company’s licence on the basis of the misconduct of an officer of the company could not stand. Section 5(1) (c) (ii) applied to corporations. Section 5(1) (b) applied to individual applicants not to corporate applicants. **The Court thereupon returned the licence of a company which had pleaded guilty, protecting the individual involved, but not the society which the company had cheated.**

One can perhaps see precisely what Justice Reid meant when he stated in the *Hughes Boat* case, cited above (p. 432), “I do not suggest that the consequences should be permitted to confute the clear meaning of a statute”.

**What does the case illustrate?**

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First, there is something disturbing when a company convicted of odometer tampering is ordered by an Ontario Court to have its licence returned to it. The licence was not a right, as described by the Court. The licence was to protect the public interest, from among other things, people who tamper with odometers. Second, this decision gave the public which is looking for protection from the courts, a bad signal, as well as sending the worst kind of signals to the industry. On the other hand, the Court was constrained by the precise words of the legislation.

The reason I recite the case is to point out how difficult it is to achieve the balance described. One can demonstrate that by protecting the private interests of the individual, one can fail to protect the larger interests of society. Other examples exist.

It is essential to understand that we have emerged from Dicey-McRuer isolation into the daylight of the rights of society as a whole. The great challenge is to resolve the conflict with balance. A basic issue, as I see it, is the protection of society. Freedom of the individual is a basic value, but this must be weighed against other values necessary to preserve society as a whole. The issues were concisely set out in Appendix F.2 of the Final Report of the Le Dain Commission, entitled *Whether, in Principle, the Criminal Law Should Be Used in the Field of Non-Medical Drug Use*. Inevitably this may mean discarding some traditional tests and procedures; some of which fail to evaluate the worth of a whole society.

In the *Coates* case, the Court gave the statute a literal and perhaps inevitable interpretation, but the Court did not express the slightest reference to the public interest. The Court fulfilled its mandate. One can clearly see the contrast between what motivated the Court and what motivated CRAT.

CRAT clearly had as its basic concept or value, the protection of the public. It determined that the car buying public needed to be protected from bad dealers. This is indeed a valid social objective which squares with the overall intent of the statute and the program of licencing and inspection established by the Legislature. The Court on the other hand determined that the deeper social value was to ensure that officials act only when there is clear legislative authority permitting them to do so. The social value lies in adherence

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to statutory authority. In effect, the Court found that if the purpose of the system of laws, courts, licensing schemes and officialdom is to protect society, the greater danger arises, not from bad car dealers, but rather from officials acting without proper statutory sanction.

Of course, these observations are subjective. There are other views.

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## 4.3 CONCLUSION

Throughout this Report, I have sought to recommend changes to procedures and structures that govern the agency decision-making process and to support these changes with explanations, which under-pin the justification. These changes, I feel, if adopted, will greatly improve the quality and performance of administrative agencies in Ontario. From an operating point of view, and from a delivery of service point of view, I have been critical of the McRuer Report and the legislation which it spawned. The criticisms have related to the appropriateness of those concepts and legislation in today's environment.

My review of the several views or theories suggests several conclusions.

**First**—There can be more than one view at any given time about what is in the public interest and what is the proper scope for administrative law.

**Second**—No view of the public interest or of the scope of administrative law will stand for all time. The public interest has been perceived as being identical to individual rights (McRuer); or to represent the survival of society in wartime or emergency situations, or it can be seen to be where society places the fulcrum to achieve a balance between the interests of the individual and the public interest.

**Third**—My description reflects what I view are the needs in the field of administrative agency decision-making today. These needs will shift, no doubt as events act and we react. The concept of balance may become inappropriate. For this day and age, the administrative practice and the legislation upon which it is constructed, assert that there be a recognition, that in some matters, the amalgam of public rights of society will take precedence over the rights of the individual. Only the slightest reference to our laws dealing with the consumption of liquor, the planning of neighbourhoods and cities, environmental legislation, the sharing of wealth and opportunity, show clearly that this century has left *laissez faire* in its wake as it has steadfastly moved to respect and nurture of the rights of the many. This does not mean the abandonment of the individual, but it certainly means the abandonment of some of Dicey-McRuer and some of what they espoused. It also means that agency



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decisions must reflect the direction in which the constitutional Supremacy of the Legislature takes us and to that extent changes should be made in three areas.

### **(i) Authority and Procedures**

In viewing administrative law as the process of balancing group and private interests in the public interest, one should consider types of processes that go beyond the judicial models suggested by McRuer and are incorporated in the *Statutory Powers Procedure Act*. I believe that there are better ways of resolving the private and public conflicts with government than through adversarial confrontation. As a result, in Chapter Nine, I shall set out a number of specific powers and procedures which should be conferred on agencies to increase their effectiveness and efficiency. I believe that the powers and procedures which I recommend, will increase “fairness”, by providing greater “substantive fairness” than currently available through the present minimum rules. These powers and procedures will better protect individual rights and will better enable agencies to find and strike the appropriate balance between competing interests.

### **(ii) Judicial Deference**

I would also note that unless the principles underlying the proposed nonjudicial but substantially “fair” powers and processes are understood by the courts, some courts may reject, ignore or misinterpret the powers and processes by applying the traditional values and assumptions of the court system. I am not recommending that judicial review be curtailed. I recommend, however, that the policy of judicial deference be extended, and that the extended policy be set out in statutory form as a principle of interpretation. The courts should be able to review the exercise by agencies of their jurisdiction. But the courts should be discouraged from interference under the guise of an excess of jurisdiction, when in fact the court is really saying that it does not like the decision of the agency on the merits. The courts ought not to interfere with decisions where the difference between the agency and the courts is basically that the courts like to do things in some other fashion called the “Rule of

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Law". The Rule of Law can be made to turn in the hand of the holder, and when that happens, it loses its real value as a principle.

### **(iii) A Coordinated Response to Change**

The ability to change should be institutionalized. Agencies need coordinated services to help them respond more quickly to developing trends. Because this is an evolving process there is a need to monitor and to coordinate change. In the long term only the Legislature can respond to major shifts in focus and concern in Ontario. However, in the short term, much can be done to respond to change by providing coordinated services and support to the agencies. Advances in one area can be applied more quickly through coordination. Thus it is that I recommend in Chapter Eight, the creation of a Council to coordinate and to improve that which the ministries and agencies cannot coordinate for themselves.

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## CHAPTER 5

### AREAS OF CONCERN FOR AGENCIES

#### 5.0 INTRODUCTION

There are a number of concerns that relate to all administrative agencies in Ontario, regardless of whether they are called tribunals, commissions, boards, etc. This chapter is designed to discuss these concerns. I would like to add that this is not just an external viewpoint, but is shared by the agencies themselves. The concerns make it difficult for agencies to perform at an optimum level. The basic difficulty is that, for the most part, it is beyond the capacity of the agencies alone, to correct the problems.

Administrative agencies have not existed as long in their present form as the courts or government. Court and government practices, procedures and policies have existed for centuries, but in Ontario the beginnings of administrative practice and procedure were around 1900.

Yet it was only after the Second World War that the creation of administrative agencies gained momentum as governments throughout Canada stopped reacting to events and started to plan programs for the future. The implementation of these programs was left in no small measure to the newly created administrative agencies.

Administrative agency law, its practice and procedure, as a consequence, is relatively new in Ontario (as it is elsewhere in Canada). So it is not surprising that there are improvements which can and should be made in those practices and procedures. A few of the improvements are within the control of the agencies themselves, but most reside beyond their control.

#### 5.1 AREAS OF CONCERN

The areas of concern which I shall discuss in this chapter include lack of consensus,

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powers, comparative standards, appointments, independence of agencies, training, differences in mandating legislation, and lack of coordination.

### 5.1.1 THE LACK OF CONSENSUS

As I pointed out earlier, a major difficulty faced by administrative agencies is the fact that there is no consensus about why agencies have been created and therefore no consensus about the goals that should exist for individual agencies.

There are a number of reasons why there is no consensus concerning agencies in general and most agencies in particular.

- (1) The vast majority of agencies in Ontario were created by earlier governments, whose motives and purposes are not very clearly recorded. In any event, the purposes for which an agency was created, have likely changed over time, leaving the creators and the present evaluators, poles apart in their rationale for the agency.

What people often forget, is that the rationale for the courts has not changed materially over time, but the rationale for each agency, will and has changed often and quickly.

- (2) Some members of the civil service have a mixed appraisal and valuation, of agencies generally. Some see agencies as carrying out functions that properly belong in ministries while others see agencies operating at arm's length. This dichotomy creates a substantial ministerial unevenness in treatment and performance.
- (3) I mean no disrespect, but when a Cabinet of approximately 30 men and women, supported by 40 Deputy Ministers, who are themselves supported by 160 Assistant Deputy Ministers, exists, there is the potential for 230 different personal, and often private, assessments of the need for and performance of, agencies.

The point is that with little history or tradition accruing to agencies, coupled with the constantly changing nature of the need and ambit of operations of agencies, I do not find



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it surprising that there is a lack of consensus about the need and role of agencies, even within government.

But the uncertainty and lack of consensus is destabilizing and impinges upon the efficacy and efficiency of agency performance.

- (4) There has been a running struggle for years between those who see agencies as arms of a ministry and those who see agencies as independent structures. This will not change until the Cabinet itself takes a stand on the issue. What is unfortunate is that this struggle goes on, overtly or covertly, in many governments. Ontario is no exception. Where there is a struggle over control, much of the struggle centres on an honest disagreement as to why an agency exists and what ought to be its duties.

A student of this struggle for control, will observe that the intensity, and significance of the struggle, where it exists, will differ from agency to agency; and may even change from Ministry to Ministry as Ministers, Deputy Ministers and Chairs come and go and as circumstances evolve.

- (5) Concurrent with the struggle within government, there has been an additional struggle which has been equally difficult for the agencies. On the one hand, while the courts have been critical that agencies have been insufficiently protective of individual rights, many civil servants have been critical of agencies for not siding with them in their pursuit of the public interest. The stature of agencies suffers greatly in the cross-fire.
- (6) Each Ministry has its own priorities when it comes to sharing its own budget with the agencies, or when it comes to classifying or providing the agency with staff because of the residual effect upon the structure of the Ministry staff itself. Money and resources are the engine of agency capacity and performance.

Thus the first difficulty that agency administrations face is this lack of consensus. In some cases, this can lead to conflict, to paternalism or even diffidence. One can properly ask what can be done about the lack of consensus? Frankly, I believe a lot can be done!

The answer lies in education and information, as well as the creation of a Council. The

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Council can help develop standards for agencies and address solutions to issues which separate agencies from achievable goals.

I discuss this Council in greater detail in Chapter Eight.

### 5.1.2 NO CONSENSUS ON WHAT POWERS SHOULD BE POSSESSED

It is surely obvious that if consensus cannot be reached as to why we have agencies, or their specific goals, there can hardly be any consensus concerning what powers are necessary to carry out those goals or how these powers should be exercised.

From about 1950 to 1975, there was a struggle that almost amounted to a confrontation between the courts and the legislatures of Canada. The struggle was carried out under the guise of the courts exercising their supervisory power over agencies to ensure that agencies did not exceed their jurisdiction. Dean MacDonald, of the McGill Law School had identified at least 28 ways in which the courts have justified interference with agency decisions. When the courts would thrust at an agency, the legislature, in particular the Ontario Legislature, would parry with a *no certiorari* clause (or a finality clause). The *no certiorari* clause declared to the court that the Legislature did not want the court to interfere in the decision-making process of administrative agencies merely these agencies were carrying out an adjudicative “function”.

Finally in the mid-to-late 1970’s, under the leadership of the Chief Justice Laskin, and the present Chief Justice Dickson, the courts veered away from confrontation, to what has become known as a policy of “curial deference”. Under this policy, unless the agency has made a fundamental error, the court will accept the decision of the agency, even though the court would have decided the matter differently. An able summary of the struggle that ensued between the courts and the legislatures was made by Mr Justice Blair in the *Forer* case, where the court stated (at p.719):

“The judicial attitude to tribunals has changed. Restraint has replaced

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intervention as judicial policy. Courts now recognize the legitimate role of administrative tribunals in the development and execution of economic, social and political policies ordained by the Legislature. Judges also recognize that tribunals bring to bear in their decisions knowledge and expertise in their particular fields beyond the usual experience of the courts. The new judicial attitude towards tribunals is sometimes described as ‘curial deference’ ...”

Even though the courts have, as the Justice indicates, in Ontario at least, shown curial deference when it comes to court review of the substance of administrative agency decisions there remains much evidence to indicate that some judges have a very limited understanding of the fundamental purpose and goals of agencies, and particularly the real need for quite different methods and procedures to handle matters brought before them.

Professor Harry Arthurs describes how judges look at statutes as follows:

“...the refusal of judges to use extrinsic aids to interpretation is a separate concern of considerable importance. By insisting that the search for a meaning be confined within the four corners of the statute, courts are overtly serving notice, as Dicey says, that they do not care whether the interpretation adopted is one which would commend itself to either a body of officials, or the Houses of Parliament ... A less charitable hypothesis is that the courts are anxious not to know what the statute really was intended to accomplish so that they can choose from amongst the possible interpretations the one which most closely coincides with the spirit of the common law, social policies which it embodies or which they espouse, or the equities of the particular situation...” (*Rethinking Administrative Law* (1979)17 Osgoode Hall L.J.1 at p.18).

The courts are trained and steeped in methods and procedures which have served them well for hundreds of years, but which often do not serve the public interest when applied to agencies because agency mandates are very different. There may be more than one way of doing something well. It was jealousy and suspicion about the value and purpose of administrative agencies, following the 1950’s, which led to this unproductive and disruptive period of confrontation between the courts and legislatures.

The Parliament and legislatures of Canada make the laws and the policies which underlie them. It is not the duty of the courts to make policy or to “make laws. The duty of the courts



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is to ensure that Parliament and the legislatures act within existing laws. So long as the powers given by the Legislatures are within the constitutional right of the Legislatures, it is not the responsibility of courts to tell Legislatures what powers or procedures they can authorize agencies to adopt. Subject to the Charter and the Constitution, the Legislature has the right to lay down the mandate of an agency, as well as the powers it wishes the agency to exercise and the procedures it may follow to achieve the goals the Legislature establishes. In the Recommendations contained in Chapter Nine, I have proposed various amendments to the *Statutory Powers and Procedure Act* that will help agencies create procedures which are “agency-oriented”, and not “court-oriented”. This will enable administrative agencies to respond more effectively to public needs.

### 5.1.3 DEVELOPMENT OF COMPARATIVE STANDARDS FOR AGENCIES

A major difficulty faced by agencies and observers alike, is the lack of recognized standards by which to measure the performance of agencies. The fundamental reason why performance standards cannot be established results from a lack of coordination of any aspects of the performance of agencies in Ontario.

The fact that agency performance cannot be assessed by any discernable standards is not good for the public. It is not good for the Government and it is not good for either the Ministries or the agencies. There are ways in which assessments can and should be made by Management Board, a Council, each Ministry and the agencies themselves annually. The objective is to ensure that the public and the Government are getting quality performance for the investment each year of about \$160 million of the taxpayers money.

Governments, over time, have sought to create ways and means of measuring and reviewing the performance of agencies. These include “sunsetting” provisions, Memoranda of Agreement and reviews of mandates upon new legislation being sought, to mention a few. Frankly, these methods of review and assessment are not effective as outlined in the next three Chapters. One easy, inexpensive and relatively painless way of creating an acceptable



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and effective form of coordination, and through it a workable review structure, will be the creation of a Council (to be discussed in Chapter Eight).

## 5.1.4 AGENCY APPOINTMENTS

While the appointment process is of concern to the public and others, it can be very stressful for the agencies themselves. In this section, I would like to distinguish between the quality of appointees and the quality of the procedure by which appointments are made. The appointment procedure is discussed later in Chapter Eight.

There is no doubt that the quality of the performance, reputation and image of agencies in Ontario, with the public, the media and those who work with agencies on a daily basis, is in direct proportion to the quality of the persons selected as appointees.

There are some assumptions made about appointment procedures.

- A “good” appointment procedure will produce a “good” appointee. This assumption is not necessarily true.
- A “bad” appointment procedure will produce a “bad” appointee. This assumption may be equally untrue.

The test of a “good” appointee is first and foremost contained within the appointee himself and not in the procedure through which the appointment is made. The very best selection methods and procedures do not guarantee a quality appointee. On the other hand, no formal selection method at all can result in excellent appointments being made.

One is always distressed to read shot-gun comments made about appointees to administrative agencies, as if administrative agencies were veritable havens of incompetence and corruption. What I believe is inexcusable is the failure of critics to separate the appointment procedure from the quality of appointees.

Many men and women interviewed during the preparation of this Report had no idea how

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their names came to the attention of those who recommended their appointment. They suggested that their qualifications, as a teacher, a writer, an authority in a particular area, or their prominence in some field associated with the work of the agency, had recommended them. Some had applied to a Ministry to be appointed to an agency. Not only were these people not “cronies” of the government, they had never met anyone in the government.

I do not for a moment say that I would not recommend some changes to the appointment procedure, or that a good appointment procedure does not have a better chance of finding the quality candidate, but I do believe that all of these matters have to be kept in perspective. One perspective, overlooked by most critics is that often the best candidate is found but is not available or can not be attracted to the opening for an assortment of reasons.

I have no problem, nor I am sure do others, with criticisms concerning the appointment procedure in Ontario on the grounds that it ought to be more open, so that the public could feel assured that appointments are being made from the best candidates available. What many critics of the appointment process do not appreciate is that there are many influences which affect the quality of an agency’s performance other than the appointment process itself. Let me remind the reader of a few.

- Some agency members turn out to be not well-suited for the appointment, for reasons that are often difficult to discern when the appointment is made.
- Some agency members unexpectedly encounter serious health difficulties. Obviously the older the average age of the corps of members, the more susceptible they will be to ill health. Yet, available younger men and women are harder to find than many critics realize.
- Some members turn out to be incompatible and really become a burden to an agency rather than an asset. Often the problem lies as much with those that were on the scene when the new member arrived as with the new member.
- Jealousy plays a large role in the daily lives of all of us. Agency members are no exception. Each time there is a change in the chairmanship of an agency there may be one or two members who may feel that they should have been appointed. Jealousy and

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incompatibility are often serious problems for a Chair or an agency as a whole.

- Some members are appointed with excellent qualifications for certain aspects of the agency but are short of experience. There is no structure within the present system to train members of agencies. Gradually they fall further behind and their weaknesses become more pronounced.
- The relationship between the Ministry and the agency can have a material affect upon the agency's performance; what it does and how it does it. I would vouch that it would be very hard for a non-member to discern the importance of this relationship.
- Some men and women are highly qualified for some tasks but do not handle the public well. Unfortunately, this is a characteristic that is not easily discernable in the appointment process, unless the appointee had had previous public experience. Interestingly enough, a present or former politician can make a valuable contribution as an agency member because knowledge of the operations of government structure and a familiarity with public concerns are important assets.
- Some appointees are not patient and polite listeners, the most essential characteristic for success as an agency appointee. Having interviewed hundreds of potential appointees, I can assert that there is no assurance that this critical characteristic will be possessed by a potential candidate, nor is it possible to devise a test to assess it.

I do not suggest for a moment that the above are the only reasons why even the best selection system will not detect an appointment which ought not to be made. The point is that, even with the best system in the world, lots of things can go wrong, and as Murphy's Law postulates, "Whatever can go wrong, will go wrong!"

I have recommended the establishment of a Council as a means and a structure to assist the government to open up the appointment process while at the same time not lose control of an essential lever of government. The Council could provide agencies and their members with a cooperative means of upgrading the quality of performance of their agencies, which is the essence of this whole exercise.

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## 5.1.5 INDEPENDENCE OF AGENCIES

Next to the weakness of the appointment process, the most controversial concern agencies face is the endless debate whether agencies are extensions of Government Ministries or are “independent”.

The difficulty with this debate is that both sides have failed to define what they are discussing in clear terms.

What for example is the definition of “independence”? Do those who argue the independent role, suggest that there should be no recognition of government policy ? What about government directions as to budgeting, staff assignments, staff categorization, hearings in French and English? What about the government direction concerning Memoranda of Understanding between the agency and the Ministry to which the agency accounts?

How can you require an agency to account and to whom, if it is independent? If an agency is independent does that mean that it does not have to report and account to the Legislative Committee on Agencies or the Public Accounts Committee? Can an agency be independent and at the same time be investigated by the Office of the Ombudsman? Can an agency be considered independent if it can be instructed to change one of its decisions? Can an agency be independent when the appointment period can be negotiated and range from six months to 3 years? Can an agency be independent if its members can be removed from office without cause, notice or compensation? Can an agency be independent if it can be terminated? These are some of the questions that I have yet to hear the “independentists” argue in the affirmative.

Those who argue for “independence” are really referring to independence of decision-making and in that sense, an “arm’s length” relationship in terms of making decisions. On the other hand, it is surely clear that it is wrong to say that agencies are nothing more than the extension of a Ministry. If an agency is merely an extension of the Ministry, then all Ministers and Deputy Ministers have the authority to issue directions to an agency as to how it should decide a matter. I have yet to hear a Minister or a Deputy Minister make that assertion in public. The courts would overturn such an assertion in about the length of time



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it would take to give to the court, the asserter's name. The whole discussion might be academic if both sides could agree on why we have agencies, what their goals are and what powers they need to achieve those goals.

Agencies and their members face a difficult matter trying to determine their relationship with government. How the question is answered may affect how a court will deal with an agency decision. I would suspect for example that "curial deference" which is built upon the respect for an agency's ability to exercise its own judgment based upon its expertise, would evaporate if the agency was seen not to be exercising that expertise freely, and was seen merely to be a mouthpiece for a ministry. "What is the relationship of any agency to its ministry" is not academic. It is crucial to the structure and performance of administrative agencies in this Province. I believe that the difficulty can be resolved with the leadership of a Council without taking away any authority from the Ministries or detracting from the duty to exercise arm's length judgment by the agencies.

## **5.1.6 THE LACK OF TRAINING**

One of the most serious deficiencies of agencies in Ontario is the lack of a program of training for new members and training to update existing members.

With new members, training in agency procedure, the structure of government or where agencies fit into government operations may be necessary. The candidates have been selected for their expertise in specific areas of agency responsibility not government. There are other types of training that are equally necessary, such as some law. I must frankly admit that courses covering this material would be better taught by outsiders to give fresh and objective assessments in these matters. Even so, the agencies themselves simply do not have the time or capacity to undertake extensive training on a broad scale.

Another type of training that is equally important but which can come a little later in the first year of the appointment focuses on current trends within the expertise of the agency. It is as important to keep abreast of what is going on in the area of expertise of the agency and to teach and be taught as it is to write sound decisions. Even decision writing is an acquired art that must be taught. As I interviewed hundreds of men and women involved in agency

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operations, either within a Ministry or within the agencies, I was struck by the insularity of their perceptions and lack of information about the newer and better ways of dealing, with dispute resolution, for example. The most significant failure of the courts and of agency procedures in the 1980's has been the inability to deal efficiently, expeditiously and inexpensively with the what is known in administrative circles as "mass adjudication". What is clear is that even if the agencies were aware of new techniques and procedures that could lead to greater expedition and increased efficiency, the agencies do not possess the statutory authority or resources to make the necessary changes.

We have a great opportunity as we enter the 1990's to take some important steps in coordinating and improving the performance of all agencies. Judges and lawyers are offered courses of interest and concern, almost every day of the week somewhere, but there is nothing for agency members.

I have included a rather lengthy section on training in Chapter Eight and do not wish to repeat the same material here. I will end this section, however, by commenting that the Council which I propose, should be responsible for coordinating and presenting the training courses, which I believe most knowledgeable persons will endorse as an essential element of a strong administrative agency structure.

### **5.1.7 DIFFERENCES IN MANDATING LEGISLATION**

One of the reasons why it is hard to perceive a pattern in agency performance is because the mandating legislation for each differs significantly. The differences are caused by three factors.

- (i) Certain differences must exist in each mandating statute because of the differences in the duties of different agencies. These are necessary differences.
- (ii) Certain differences were unintentionally created when the mandating legislation was drafted. These are differences that do not need to exist. The examples are so many that there is little point in setting them out here. I, myself, handwrote the legislation which

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set-up several Ministries and about half a dozen agencies. I know from my own experience as a draftsman, that there was no thought given to the problems diversity in mandates would create. But today we do have to think about how differences in procedure are perceived by the public.

- (iii) Many differences result from different authors, different draftsman, different times and different needs. Some mandating legislation was written prior to the McRuer influence and the subsequent passage of the *SPPA*. Some of the mandating legislation was written with the McRuer influence in mind, and after the passage of the legislation dealing with review of agency decisions by the Divisional Court and the passage of the *SPPA* in mind. Additionally, the current legislation creating agencies or dealing with the mandate of existing agencies, seems to me to have less of a judicial bent than during the latter days of the Davis Government. Thus one has to be very careful when comparing legislation to realize the different bias which clearly shows up in the legislation. One cannot safely interpret one statute by looking at another. Even enactments dealing with much the same subject and enacted the same day can not be read together or compared to find the meaning.

Whatever the reasons for the differences in statutes, many of the differences, are in my opinion, unnecessary and create, unnecessary differences in the manner in which agencies hold hearings or conduct themselves. Just as there is nothing sacred in uniformity, there is nothing sacred in differences which make it difficult for the public to perceive agencies as part of their government, and before which, the public should be able to appear with ease and confidence. Neither the agencies nor the government own the agencies. They are a public service, owned by the taxpayers of this province, and they should be managed for the public.

There should be some predictability as to how an agency will conduct its duties, but that is not possible when every mandate is sufficiently different that an observer can hardly tell how an agency conducts its business without a lawyer. Where mandates must differ and these differences lead to some variations from a uniform procedure and behaviour, then so be it! But where there are irrelevant differences that hurt the public, I see a sound reason to try to bring consistency to some of the statutory powers available to agencies as well as enable



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them to create more uniform procedures. This I believe can be done easily through permissive legislation amending not 91 but one piece of legislation, namely the *SPPA*. It can be accomplished by negotiation and cooperation through the ministries, the agencies and the Council.

We have never tried to coordinate and make uniform, procedure where it can be made uniform. As I have said, you do not expect that the procedure in every courtroom will differ with each judge or each issue to be decided. We never could have developed any uniformity of the rules of natural justice and fairness if every judge had been left to manage things in his own way so that a member of the public had to be a member of the elite to take part.

My interviews lead me to believe that most agencies would be willing in the public interest to try to bring more uniformity to procedures and practices where there is no need for differences, but preserve the differences, where required.

This is not the only issue that arises from the differences in mandating statutes. There are two others.

- (i) In many respects the *SPPA*, as presently drafted, lays down a minimum code in the spirit of the McRuer influence—namely formalism and judicialization. The *SPPA* should be liberalized to *permit* different ways of doing things to avoid thrusting square pegs into round holes.
- (ii) The *SPPA* should be amended to empower agencies which want or need to operate in some fashion never envisaged by the draftsmen of the *SPPA* to do so. This can be accomplished by elective scheduling. I am of the belief that much can be accomplished by allowing agencies to conduct themselves with more uniformity yet with greater flexibility in the future. This would enhance the quality of service and better the public interest. The diversity of mandating legislation is both an asset and a liability. If there was no way removing the liability side of the equation, I would opt for diversity, but there are ways to give agencies greater flexibility to modernize and attempt the most innovative processes of dispute resolution.



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### **5.1.8 LACK OF COORDINATION OF AGENCIES**

There is a lack of coordination of administrative agencies in Ontario where there ought to be greater consistency. It is impossible, as I discuss in Chapter Eight, to coordinate and make consistent, various characteristics of agencies through 91 agencies themselves and the 20 ministries to which they account. Rather than repeating or summarizing the essence of some of the recommendations contained in Chapter Eight, I would ask the reader to turn to that Chapter to consider the consequences of the absence of coordination.

### **5.1.9 LACK OF COORDINATION IN DRAFTING LEGISLATION**

Here again is a subject with which I deal in some detail in Chapter Eight. Again, I would ask the reader to turn to the Section in Chapter Eight which deals with drafting legislation. The essential point is that the drafting of legislation should be better coordinated and pursued by planners and draughtsmen with some administrative law experience. There should be one project director for the draft. The draft should be circulated to a broader audience and this should include the Council and the Chairs and members of the agency, which will be affected by the legislation, and who in all likelihood will be required to implement and make the legislation operative.

## **5.2 CONCLUSION**

These are nine areas of concern which the 91 administrative agencies face in Ontario. Some are more complicated than others, and some are more easily resolved than others. But they are all resolvable and once resolved will lead to a far more cost effective and efficient agency delivery system in Ontario. It won't take a lot of money, but it will require some leadership and coordination. Most importantly, the implementation of this report would leave the Treasury of Ontario a net beneficiary.

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## CHAPTER 6

### THE AGENCIES AND THE OMBUDSMAN

#### **Quis custodiet ipsos custodes?**

#### 6.0 INTRODUCTION

The Office of the Ombudsman is an agency, but it differs from the 91 Regulatory Agencies discussed in this Report. It is, in a unique way, an agency of the Legislature, and it has during its fourteen years of existence frequently become involved with administrative agencies and their decisions. In other jurisdictions, notably the UK, the Ombudsman has no power to investigate the decisions of administrative agencies. In Ontario, the Ombudsman has such power. The implications of this power, and the manner in which it is exercised are examined in this Chapter.

In my conversations with a few of the agencies, and with staff of the Office of the Ombudsman, I discovered an unhealthy tension between the two, which in the interests of the Province, should be understood and eased.

When I was directed to report to Management Board on administrative agencies, particularly what Management Board calls “Regulatory Agencies”, I was asked by the Honourable Murray Elston to look at any agency, which may have a significant impact upon some or many of the Regulatory Agencies.

As I advanced my work, it became apparent that some agencies have had an ongoing relationship with the Office of the Ombudsman, but some more than others were concerned about the investigations and the demands, put upon some of them by the Office of the Ombudsman. These demands have created considerable tension. This matter should be reviewed.

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## 6.1 HISTORY OF THE OMBUDSMAN

The creation of an Ombudsman goes back to the Roman Empire. In China, about 200 BC, the Han Dynasty created a person to supervise the performance or omissions of bureaucrats. Soon after the turn of the 20th Century, many other nations embarked upon the creation of an Office of the Ombudsman. There are Ombudsmen in over 100 countries in the world. Their respective powers greatly differ. In 1975, the Province of Ontario became the eighth province to create an Office of the Ombudsman. At the national level, there are a number of Officers and Commissions which carry out functions similar to those of an Ombudsman. As of the spring of 1989, there were Ombudsmen in every province of Canada except Prince Edward Island.

It is beyond dispute that government for the people, by the people, and of the people, can on occasion be very unfair. There are so many decisions that have to be made each day by governments, that they must find ways to delegate to others the implementation of policy and legislation. Hence there are in each province, and at the national level, hundreds of thousands of civil servants who carry out “governing” on a daily basis.

The gamut of this governing runs from the making of decisions to implementing them. Inevitably, in the decision and implementation process, there will arise dissatisfaction among those affected. Until the 1960's or 70's, the person with a complaint, serious or otherwise, was often without practical recourse. The courts were available but the cost and time it took to get to the courts meant that for all but the most egregious wrongs, the wrong or error went unredressed.

The courts are really not a suitable forum in which to redress what are called bureaucratic wrongs. Their process is too slow, expensive and ponderous and the courts deal in a framework of adversarial confrontation, which is not conducive to speedy and informal redress of citizen complaints. Court action pits the citizen against the government which is not in the interest of the smooth operation of administrative law or the credibility of governmental administration. And finally, the courts do not deal in conciliation and mediation yet most citizen complaints can be conciliated. A more suitable forum than the courts must be found.

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The Office of the Ombudsman is one of the forums which can within reasonable limits and in appropriate cases carry out redress for citizens. The statistics of the Ombudsman's Office underscore that it is unnecessary to include major decision-making agencies in the full ambit of his authority. I use what I assume are reliable statistics of the Ombudsman himself, taken from his own Annual Report for the year 1987/88 (the last full year available to me for this purpose).

In the year 1987/88, the Ombudsman received 4,067 complaints. Of the 4,067 complaints the following seems clear.

- 220 were independently resolved;
- 365 were unsubstantiated;
- 664 were abandoned;
- 812 were withdrawn;
- 1,972 were not proceeded with;
- 34 of the 4,067 complaints led to, what the Ombudsman calls "Complaint-Supported". Of the 34 complaint-supported complaints, 4 led to no recommendation by the Ombudsman; 24 led to recommendations being presented to the decision-maker for a change, presumably in the decision, and 6 of the complaints led to recommendations in which the decision-maker refused to acquiesce.

To me this means that out of 4,067 complaints, only 30 led to a recommendation by the Ombudsman. This is slightly more than one half of one percent.

The main point is that of the 30 recommendations, it appears that not one involved a decision-making agency. Seventeen involved the Workman's Compensation Board (the WCB is not an "adjudicative" agency in my opinion). Of the remaining 13, two involved the Teachers Superannuation Commission, the balance a Ministry and not any kind of an administrative agency.

If one goes back to the prior year, 1986/87, one finds that only two recommendations out of 5,897 affected a decision-making agency (namely the Social Assistance Review Board which has been reshaped). I would like to observe that the hearing agencies in this



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province make over 20,000 decisions in a year. I believe that if out of this number of decisions, there are only two recommendations in two years affecting 40,000 agency decisions, both the Government and the Legislature can have a strong confidence in the competence of the 91 Regulatory Agencies. Therefore, I recommend to the Government that it consider the amendments to the *SPPA* which I have proposed in this Report.

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## 6.2 THE DEBATE ON THE OMBUDSMAN

I refer to a number of statements made at the time of the debate during the enactment of the *Ombudsman Act* R.S.O. 1980, c. 325, which were either erroneous or fragile and which may have had an influence on the early development of the Ombudsman's office. The debate suggests to me that the Legislature had ascribed to the office a role and powers which are quite different from the provisions contained in the *Ombudsman Act*, and in any event, different from the way in which the Ombudsman has exercised his authority.

The then Attorney General on page 3,099 of the Debates of the 29th Legislature, the 5th Session stated in part:

“The role of the Ombudsman is not to duplicate the courts or assume their role. His role is not to substitute his policy for that of the government, because the government has to live with its policies and will be tested from time to time, particularly during question period on the floor of this House, in interviews and in terms of general elections.”

With great respect to the former Attorney General, it seems to me that when the central authority of the Act gives the Ombudsman the right to find that a decision is **WRONG**, for any reason, not embraced by the other grounds found in section 22, that one cannot but conclude that the Ombudsman, of necessity, must look at policy, and criticize it when its implementation leads to what he concludes is a “wrong” decision. In looking at policy of which he disapproves, the Ombudsman does not substitute his own policy, but rather declares that the policy is “wrong”. The Attorney General at the same time made another statement with which I have difficulty:

“I just want to make very clear that the Ombudsman is not being appointed to reverse or to affect decisions, except where there has been maladministration or where there has been some arbitrariness on the part of some agency or individual within the government”. (p. 2,888)

If that is what the Ombudsman is to look at, namely only maladministration, whatever that is, or arbitrariness, then the Attorney General, I submit, misread section 22 of the Act, and

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the spirit of the balance of the Act. Not only that, I do not believe that the word “wrong” as used in section 22 could possibly be limited to “maladministration” when one reads the subsections which precede the subsection using the word “wrong”.

The Attorney General went on to state (at p.2,888):

“...he is not there to use his influence to reverse decisions which may not be acceptable to individual members of the public, although fairly made and so on.”

If one gives section 22 a fair reading, I believe that it is very clear that the Ombudsman is authorized to bring about a reversal of the decision complained about on the simple ground that the Ombudsman thinks that the decision is “wrong” and there is no mention of maladministration.

During the same debate, the Member for Riverdale, Mr. Renwick, made a statement which contains a major contradiction (at p.3,104):

“But my understanding...is that the decisions of the Workmen’s Compensation Board and the decisions of the Ontario Labour Relations Board, which have formerly been excluded for consideration or review by anyone, will be now open to investigation by the Ombudsman; not for the purpose of reversing, altering, amending or confirming the decisions of those boards, but for the purpose of reporting under the provisions of subsection 4 of section 22.”

First of all, there is no doubt that the Ombudsman does exert his influence upon agencies to change their decisions. Not only does the Ombudsman try to influence changes in the decisions but so does the Standing Committee.

Mr. Renwick clearly alleged that decisions of agencies were to be investigated, not so that they could be reversed, altered, amended or confirmed but so that a report would be made to the Premier and the House, *if the agency refused to make the change that the Ombudsman wanted*. Mr. Renwick was clearly alleging that the investigation is not to bring about a change in the decision, while at the same time referring to a section of the Act which provides what will happen if the agency complained of, does not make a change in

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its decision.

The debate shows that the clear authority of the Legislature over the Ombudsman, and the need to strike a balance between the Ombudsman and the agencies was blurred from the start.



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### 6.3 THE “INDEPENDENCE” OF THE OMBUDSMAN

The Office of the Ombudsman is said to be “independent” of the Executive, but at the same time is “accountable” to the Legislature. What should be observed, as I have said elsewhere, “independence” and “accountability” are quite different. When the word “independence” is used, at most it means “independence of decision-making”, and not “independence of action”. The Ombudsman like many administrative agencies ought to be “independent in his decision-making”, but he cannot be “independent of action” otherwise he is unaccountable. I would urge anyone who wishes to follow the rather complex relationship as observed by the first and succeeding Ombudsmen of their role to read a very detailed Report by the first Ombudsman, Mr. Maloney, dated April, 1979, which is available in print. The Report described the obvious schizophrenia of admitting on the one hand that the Ombudsman is an agent of the Legislature while demanding on the other hand that he be free from any instruction as to how to carry out his office. Any monitoring by the Legislature or instructions were seen by Mr Maloney as destroying the whole purpose of the Office. Nowhere in print does Mr Maloney resolve how he as Ombudsman can be accountable to the Legislature, while being free of it, at the same time.

**May I say at once that the Ombudsman is not independent. If the Ombudsman is independent then there is no Supremacy of Parliament.**

*First*, the Ombudsman is bound by the *Ombudsman Act* which puts clear limits upon what he may and what he may not do. That is hardly the hallmark of independence.

*Second*, the Ombudsman must respect and is bound by an assortment of general and specific legislation enacted by the Legislature of Ontario.

*Third*, if the Legislature decides to repeal the *Ombudsman Act*, it constitutionally has the right to do so. Furthermore, the Legislature has the right to amend the Act as it sees fit whether the Ombudsman concurs or not.

*Fourth*, the Ombudsman is subject to the rules which the Legislature may establish from time to time.

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*Fifth*, it is quite obvious from the provisions of the Charter of Rights that the Ombudsman may not breach any of those entrenched rights.

*Sixth*, as I indicated earlier, I believe that the privative clause contained in the Act will not protect the Ombudsman from judicial review in some circumstances.

Thus clearly the Ombudsman is not only a servant of the Legislature, but he is not independent and is accountable.

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## 6.4 THE ROLE OF THE STANDING COMMITTEE ON THE OMBUDSMAN

Fortunately, the Act itself makes it clear, that the Ombudsman is subject to the authority of the Legislative Assembly, which authority is exercised through the Standing Committee on the Ombudsman. Why did the Legislature create the Ombudsman Committee originally or as now constituted? With great respect, I cannot find any declared duty for the Committee to fulfil if it is not to oversee the operations of the Ombudsman, to consider his reports and then to report to the Legislature.

I know that the Government established the Ombudsman Committee for several practical political reasons, which are as old as government itself.

- (a) Because of the workload to be handled in the planning of the political agenda for an entire Province, the Legislature cannot possibly attend to the fine detail of the daily operations of government. Accordingly, the Committee was established and the Ombudsman was required to be accountable first to it, and then to Legislature. To account, one must do more than report what one has done. One must be seen to have followed rules and procedures laid down by the Committee on behalf of the Legislature. The Ombudsman is subject to, not above, the Legislature in Ontario.

It must be clear that the Legislature can give to the Committee the authority to act. Surely there is no one who would suggest that the Ontario Legislature can be held the hostage of the Ombudsman.

The Legislature was given authority to establish Rules for the Ombudsman, which he has resisted from the beginning. The authority to make rules must include some direction as to how the Ombudsman will conduct his investigations. One can read an endless amount of material written by people associated with the Ombudsman's Office (old and new) and can find no delineation of the authority of the Legislature or the Committee. The assumption is that the only step the Legislature can take is to remove the Ombudsman if it is dissatisfied with his conduct, but this seems illogical. An agent is an agent and an agent shall respond to the directions of

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the principal. The Ombudsman is the agent of the Legislature.

It is clear from Section 16 of the Act that the Legislature intended to have the right to deal with the Ombudsman and lay down “rules” to guide him in carrying out his duties. This right the Legislature delegated to its Standing Committee on the Ombudsman (the Legislature of Ontario to date has made certain minimal rules which are attached as Appendix 6-1). It is extremely important that this link between the Legislature and the Ombudsman be recognized and understood as it has never really been acknowledged by the first Ombudsman, Mr Maloney, or satisfactorily accepted, in my opinion, by any subsequent Ombudsman.

- (b) The second reason why the Legislature established the Standing Committee was to create a forum for various parties to debate and discuss the issues which have been raised by the Ombudsman. There is no way that witnesses can be heard and evidence presented before the whole House. The Standing Committee structure historically has been the appropriate forum as it becomes a buffer, a sorter, a monitor and where possible, a resolver.
- (c) By presenting matters first before the Committee rather than before the House, confrontations between the Ombudsman and a Minister can be either avoided or minimized (or at worst, prepared for). One must not lose sight of the fact that most of the decisions for which the Ombudsman receives complaints are made within a Ministry for which a Minister is finally responsible. Historically, with limited exceptions, any government of the day attempts to protect a Minister from attack. The Committee structure exists to minimize such confrontations where they can be reasonably foreseen and avoided. Through this mechanism, the House deals with one of its own committees, rather than having to deal with the Ombudsman himself.

There have been arguments made that the Committee on the Ombudsman is “apolitical”. With great respect to those who employ this notion, it is incorrect. The Committee is not apolitical in its structure or mandate.

The Committee is composed of members of the three elected parties in roughly the



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same proportions as the House, with the majority of the members being members of the same party that forms the government. Committee members respond to their own party Whip. Any Committee which responds to Whips is not apolitical. Not only that, but the mandate of the Committee, as well as its structure, make the Committee a delegate of the Legislature and subject to the Legislature's instructions. There is not a word in any documentation creating the Committee, or any authority in constitutional law, that suggests that such a Committee shall be "apolitical" and free of the Legislature nor has the Committee any power except that given to it by the Legislature.

Whatever may be the role of the Committee, it is not, and as an agent of the Legislature, cannot be "apolitical". I think it worth noting that the role of the Committee traditionally has been one of "reaction" and not "proaction". I have made some recommendations about Select and Standing Committees in Chapter Eight and I do not restate them here. However, I would like to speak about the process of taking an agency or its decision before the Standing Committee on the Ombudsman.

Bringing or threatening to bring an agency before the Committee on some of the matters I have discussed above, can in my opinion, impair seriously the integrity of the agency system and the members who make it up. Taking an agency before a Committee of the Legislature, because it has reached, a decision with which the Ombudsman disagrees, is both disagreeable, and may be out of proportion to the issue at hand. On the other hand, the Legislature is supreme in this Province, and it clearly has the right to reject a decision of an agency. My only concern is that the step should be taken with caution and substantial care, by all concerned. Taking the agency before the Committee can be a serious attack upon the independence of the decision-making capacity of agencies. I do not question the legality of such procedure, but I do question the wisdom of it, and even the necessity of it. I believe that some rules of procedure before the Committee, should be developed to make sure that the ramifications of the process are considered. In supporting the Ombudsman, the process should take into consideration the damage that can be done to the status and respect for the agency process. The courts can only interpret

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and support the precise words of any legislation, no matter how wrong or unfortunate the court may think the language.

The courts have little power to curb the Ombudsman. The Standing Committee has that duty at present. The Court tried to warn the Ombudsman in the recent 1987 *Ontario Labour Relations Board* case that there are limits to his power. I firmly suspect that the courts will attempt to protect the integrity of the administrative agency, where they can. There is much that is good in the Ombudsman ethic and it has accomplished many useful results. We should strive to improve its evolution, but at the same time, we must not take the agency decision-making process to the point where its independence of judgement is impaired. And this can easily happen!

I would, therefore, recommend that there be established by the Committee on the Ombudsman, rules of procedure which would govern how he is to carry out his powers; how he is to report his findings; what procedures he should use as he deals with the agencies (particularly the major decision-making agencies), and how the agencies will be dealt with by the Committee. In arriving at these rules, I would recommend that there be a working committee set up with the Council, so that a procedure can evolve that will protect the integrity of the agency system, while still enabling the work of the Ombudsman to proceed as he carries out the Act.

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## 6.5 SPECIFIC PROBLEMS RELATING TO THE OMBUDSMAN AND AGENCIES

- (1) Section 13(2) of the *Ombudsman Act* enables the Ombudsman to disclose information which he has obtained in the course of his investigation to establish grounds for his conclusions and recommendations. While on first blush, this provision may seem reasonable, it must be remembered that much evidence comes to the Ombudsman in confidence, some protected by Ontario privacy legislation and other acts such as the *Labour Relations Act*.

The Court of Appeal in Ontario, in *Re Ombudsman and O.L.R.B.*, (1987) 58 O.R. (2nd) 225 made a statement which reflects in my view, its concern for the Ombudsman's most recent efforts to reach into the confidential files of the O.L.R.B. when it stated (at p.229):

“During the course of argument, questions were raised about the extent to which the Ombudsman is entitled to pursue his powers of investigation. These questions arose in the context of cases in which the Ombudsman has sought to investigate the board's quasi-judicial decisions. It appears for instance, that he has sought to investigate complaints relating to such matters as the board's assessment of the credibility of witnesses, its determination of the weight to be given to evidence presented at a hearing, its assessment of collective bargaining policy considerations, and its determination of the proper interpretation and application of provisions of the *Labour Relations Act*. In investigating these complaints the Ombudsman attempted to compel the production of such items as the notes of an adjudicator taken at a hearing and files of the board containing information that the board does not consider to be of a public nature. The board's ultimate refusal to provide any information about its adjudicative decisions resulted in these proceedings.....the question remains as to the board's duty to provide evidence as demanded by the Ombudsman.

A determination of that question...must await factual circumstances in which the question is raised directly....However it can be observed that the Ombudsman's power to obtain evidence is by no means unlimited.”

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The Court further commented upon this aspect of the Ombudsman's powers of production by saying (at p.230):

“Having regard to the provisions of these two statutes it is sufficient to conclude for our present purposes that the extent to which the Ombudsman may compel production and obtain information in any given case will depend on the nature of the evidence sought considered in the light of section 20 of the *Ombudsman Act* and the provisions of the *Labour Relations Act* designed to maintain the secrecy of the matters before the board.”

Frankly, I do not think that the Legislature should leave the matter in the kind of uncertainty outlined by the Court. It would be an easy matter in the Rules to which I have referred, to deal with the production of material. The production of this kind of material should be carefully thought out.

- (2) Section 15 provides that the function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his or its personal capacity.

It is interesting to observe that the jurisdiction covers “the course of administration of a governmental organization”. Had it not been for several court decisions to the contrary, I would have thought that one could argue that an agency, when it is acting adjudicatively is not acting administratively. I submit that what the courts in several cases have really found was that when an agency is acting adjudicatively that it is acting administratively, because “administrative” describes the part of government “which administers the law and government policy”. Thus the courts have concluded, wrongly I submit, that section 15 of the Act applies to an agency decision. The foundation of this judicial interpretation is found in a decision in *Re Ombudsman of Ontario and Health Disciplines Board* (1980) 26 O.R. (2nd) 105 (C.A.).

In *Re Ombudsman and OLRB* (1986) 52 O.R. (2nd) 237, the Divisional Court was



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not concerned about the consequences of its interpretation of Section 15. To use its own insensitive words (at p.241):

“The investigation by the Ombudsman does not directly affect the finality of any decision of the board. In fact, the Ombudsman cannot investigate until after all appeals are exhausted.....where the Ombudsman believes a decision to be wrong, the Ombudsman reports his findings to the appropriate governmental organization....and may request it to notify him of steps it intends to take to give effect to his recommendations. If none are taken, he may send a copy of the report to the Premier, and thereafter may report to the Legislative Assembly. The effect is publicity and political scrutiny only. The report does not overrule the decision of the Board.”

The statement is “obiter”, trivializes the consequences of the Ombudsman’s Report and shows an unfamiliarity with the effect of the process. But the statement doesn’t even acknowledge the legal impossibility of challenging an agency to change a decision which it has no legal right to change.

The clearest example of the chasm between what the Ombudsman can ask the agency to do, such as change its decision, and the power of the agency to comply, even if it thought the Ombudsman was right, is disclosed in a recent matter which came before the Criminal Injuries Compensation Board and later the Divisional Court. Here the Ombudsman and the Committee asked an agency to change a decision which it had no statutory power to do.

The process of how the decisions of the agencies are handled by the Ombudsman, the Committee and the Legislature ought to be reviewed. By no means is the effect merely that trivialization as described by Mr. Justice Steele in the above decision.

(3) Section 15(3) also provides:

“The powers conferred on the Ombudsman by this Act may be exercised notwithstanding any provision in any Act to the effect that any such decision, recommendation, act or omission is final, or that no appeal

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lies in respect thereof, or that no proceeding or decision of the person or organization whose decision, recommendation, act or omission it is shall be challenged, reviewed, quashed or called in question.”

The power to investigate is subject to the caveat set out in Section 15(4).

“The Ombudsman may not investigate a decision which is subject to appeal on the merits or subject to review by the courts, until the right to appeal or review has been exercised or the time therefore has expired.”

The Ombudsman may state a case to the Divisional Court if he has doubts about his jurisdiction. I would recommend that there be a provision whereby a party to or the agency involved in an investigation may apply with leave to the Court, as in many statutes, to ask the Court a question concerning the Ombudsman’s jurisdiction or some other matter of law.

I have included in Chapter Nine a draft amendment to the *SPPA* which would deal with that matter.

(4) Section 27 provides:

“Except on the ground of lack of jurisdiction, ...no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed or called into question in any court”.

I would observe that while the Ombudsman can only be challenged for an excess of jurisdiction, there are at least 28 ways the courts have invented to make that finding, of which “bad faith” is already one. As I shall indicate below, I believe that a court in an appropriate case will look right through the above “finality clause”. The section, of necessity, implies that a court could not protect someone against the Ombudsman’s denial of natural justice or his infringement of the Charter of Rights.

The Charter of Rights did not exist when the *Ombudsman Act* was enacted. No

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“privative clause” can constitutionally exclude the court from reviewing the powers of the Ombudsman, if he impinges upon rights which are entrenched in the Charter of Rights. It is clear from the Nicholson case that an administrative act still must be carried out fairly and I believe that the Ombudsman must observe the rules of natural justice.

- (5) Who is to check and monitor the actions of the Ombudsman? The Act says that one cannot go to the courts and if one carefully reads the statements of the first Ombudsman, one will, I believe, see that that Ombudsman did not believe that the Legislature or the Standing Committee had any authority to intervene, except to remove him for cause. Removing an Ombudsman is an extreme recourse and an inadequate alternative to providing rules or giving directions.
- (6) Perhaps one of the most perplexing aspects of the ambivalence of the Ombudsman’s concept of his duty, exceeding in complexity his historic unwillingness to accept directions from the Legislature, is the life that the Ombudsman and his followers breathe into the meaning of the word “wrong” as used in section 22(1) of the Act.

Section 22(1) provides:

“22.- (1) This section applies in every case where, after making an investigation under this act, the Ombudsman is of the opinion that the decision, recommendation, act or omission which was the subject matter of the investigation,

(a) appears to have been contrary to law;

(b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;

(c) was based wholly or partly on a mistake of law or fact; or

(d) was wrong.”

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When one looks at the subsection, what can “wrong” mean?

Certainly “wrong” cannot mean that the Ombudsman has found a material fact that the agency did not know about because that is already covered in the section. The presence or absence of a fact can be a mistake of fact or a mistake of law. The word “wrong” almost seems to mean, as Humpty Dumpty said in Alice Through the Looking-Glass, “It means what I choose it to mean, neither more, nor less.”

It is a canon of interpretation of statutes that a meaning has to be ascribed to the word “wrong” and the meaning should not be a meaning already covered by words preceding the word “wrong”. One is then hard put to give the word any meaning that the court could interpret. The Legislature did not mean to permit the Ombudsman, to operate at whim, particularly if one refers to the debates at the time.

I suspect that the matter may never go to a Court to interpret the word, for one can hardly imagine an Ombudsman relying on the word “wrong” when the three subsections immediately preceding simply resound with “wrongness”. I suspect further that any Ombudsman who did rely on subsection 22(1)(d) would at once disclose that he was really opposed to some policy of government, which the “then” Attorney General assured the House would not be the case.

- (7) There is much tension today between the major decision-making agencies and the Ombudsman’s Office partly because of the way the Office feels a few agencies have conducted themselves in recent years, and partly because of the way in which the Office approaches the agencies.
- (8) A major difficulty is created by the fact that at best the Ombudsman is a generalist with no expertise in the subject matter under review, has never heard the evidence and at best has heard only one side of the issue. The Ombudsman’s Office has to start an investigation somewhere, and obviously the starting point is with the complainant and the complaint. The next place to investigate is the file of the agency, the record of the hearing and the decision that was rendered. Thus



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obviously, when the Ombudsman approaches an agency he will do so, having heard only part of the story. It is quite clear from reading Annual Reports of the Ombudsman that very few complaints lead to action by the Ombudsman in terms of agency decisions. I have tried to consider in a neutral manner, both sides of the way in which the Ombudsman's Office conducts an investigation and have come to the conclusion that the Office has had to assume a rather tough stance because of the way in which Office enquiries have been treated by several agencies in the past. On the other hand, as I have said, I believe that it would be appropriate for the Committee to develop guidelines as to how the Ombudsman should conduct his investigation of agencies. What is at issue is not just the Office of the Ombudsman, but also the function and structure of the agencies, which are every bit as vital to the administration of this Province, as the Office of the Ombudsman, and affect far more lives, and far more seriously in most cases.

Thus the eighth problem which the agencies feel they have with the Office is one of attitude and the disposition of the Office. I feel that this would improve if the agencies felt that their concerns could be addressed before the Committee, aided by some clear rules or regulations by the Committee or the Legislature.

- (9) The ninth major problem which the agencies have with the Ombudsman's Office is that the Ombudsman seeks to have the agency Chairs or members of the hearing panel explain what led to their decision and to discuss the rationale of the decision with the Ombudsman. Even the common law does not tolerate this for judges and I believe that the courts would be of the view that the Ombudsman should not go behind an agency decision, in the sense of examining the agency. The decision must stand on its own. The potential for abuse of this process is immense. There is only one body which can control this kind of destructive investigation, and that is the Standing Committee responsible for the conduct of the Ombudsman.
- (10) The tenth concern is the attempts of the Ombudsman to secure the notes and notebooks of hearing members kept for their use during a hearing. I believe that the private notes kept by members of the agency ought not to be made public and will in the end, if they are produced, create damage to the cause of sound

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decision-making by agencies. I am informed that in a recent public statement, a senior official of the Ombudsman's Office said that the Ombudsman intended to subpoena members of agencies to question them under oath and examine their notes and draft decisions.

In the absence of clear statutory direction to the contrary, I believe that the common law dictates that neither the judge, his notes or draft decision are compellable (see a decision of Steele J. in *Clendenning* (1977) 15 OR (2nd) 97 at 101 and 102). This same concept applies in my view to members of agencies, their notes and their draft decisions (see *Re Agnew* (1988) 64 OR (2nd) 8 at 13 to 15 and also *Consolidated Bathurst*). Most of the decided cases are based upon specific statutes, but I believe that there is a general and highly defensible justification for the decisions in principal.

Notebooks and draft decisions will be meaningless unless the author is examined to explain what was written. What one member of a three member panel wrote down, means little when one appreciates that a decision is made by a majority and not by one member. One member can be wrong at the time he made a note which on reflection he realizes later was inappropriate. Some members write down next to nothing while others write pages. If there is to be an investigation or grilling of one member then there would have to be a grilling of the whole panel and by whom? Would it be a summer law student with temporary employment in the Ombudsman Office? It would be a fishing expedition to examine agency members as to what they meant in a decision and could as well be divisive.

To requisition a draft decision is equally undesirable. Decisions go through an iterative process of change and adjustment as the issues and evidence are discussed among the panel members. Looking at one draft will not tell you anything worthwhile and unquestionably will require the whole panel to explain the changes in nuance if not in direction. Many drafts are written by different panel members in a different style emphasizing different issues. When a panel has heard 6,000 pages of sworn testimony, who, but the panel, is to say in the early drafts what evidence should be condensed into a 50 page decision in the end?

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- (10) A decision must be judged on its face by the words that are used, in the absence of fraud or some such serious complaint concerning the conduct of tribunal members. I would hope that the Committee will review the need for some rule, procedure or amendment to the Act, which would protect such notes and drafts. Taking the notes and drafts home or burning them as soon as the decision is signed is not an answer. It should be known that many agencies have no reporter and that the only record of a hearing may be the notes of a panel member. A rule requiring the production, in the event that there is an allegation of fraud or improper conduct by a member of a panel could be considered, but to require private notes and draft decisions, which have no public status, in response to a demand of the Ombudsman, in my view will be destructive to the quality and integrity of the administrative adjudicative system.

I recommend that there be an amendment to the Statutory Powers Procedure Act which would protect the notebooks and draft decisions of the agency from production regardless of the source of the demand without an order of the Divisional Court. Additional amendments should be made to Freedom of Information and Protection of Privacy Act to assure similar protection.

- (11) An eleventh matter of concern arises where the Ombudsman has sought to force the OLRB to hand over confidential, signed, membership cards, which unions in an application for certification, have had to file with the OLRB. The Board has resisted handing over these cards, in the belief that they are part of the foundation of the collective bargaining process and if they are released, the release will bring about deep damage to collective bargaining far in excess of the marginal benefit that might come from securing the cards.

Some agencies can force the production of confidential and even secret information in the ordinary course of the agency's operations. The Ontario Energy Board, for example, has been doing so for nearly 30 years. The material is proprietary, but of value to the Board in monitoring the industry. When this material is provided to an agency, the material should remain protected. In my opinion, this was an oversight both in the *Ombudsman Act* and in *FIPPA* which should be addressed. (The amendment to the *SPPA* which I propose would do just that.)



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- (12) A twelfth matter relates to the Ombudsman asking for briefing papers prepared for or by the staff of an agency at the request of the agency. These documents should not be made available unless presented to the agency as part of the record or unless they are referred to by the agency in its decision.
- (13) A thirteenth concern is again in the labour field where a tribunal is made up of a union representative, a labour representative and a neutral person. To put that panel to cross-examination upon its personal notes and the drafts of its decision, and the iterations through which it went in order to arrive at its decision will seriously impair labour relations in this Province.
- (14) A fourteenth concern is that the Ombudsman has conducted some investigations before he is authorized to do so by law. He has investigated complaints before the complainant has approached an agency for the relief that only the agency has the legal authority to grant, upon and without which the Ombudsman has no jurisdiction. In this instance, I am not referring to whether or not a time for appeal has elapsed, but rather the complainant has gone directly from the bureaucrat who made the decision to the Ombudsman, by-passing the agency. If complainants believe that they can go directly to the Ombudsman, rather than proceeding as the legislation requires, the proceedings of the Ombudsman will undermine the legislative process.
- (15) The fifteenth major concern is that some agencies have and some agencies do not have the power to review, rehear, rescind or vary a decision which the agency has rendered. Even when an agency would be breaking the law by varying a decision it has issued, the Ombudsman has threatened to take the agency before the Standing Committee unless the agency in question makes the change demanded of it by the Ombudsman. That kind of process is surely unacceptable from a public office, much less being endorsed by the Standing Committee. I am led by this experience and others, to recommend that all agencies have the authority to vary and amend their decisions.
- (16) Sixteenth, after many years of confrontation between the courts and administrative
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agencies, the courts have accorded to Ontario agencies, what is called “curial deference”. This means that the courts can accept the decisions of experienced, highly skilled agencies, even though the courts might feel that they would have decided a case differently, so long as the agency has not made a patently unreasonable decision. Much of our administrative law is founded upon the concept of curial deference.

If an agency can be forced to abandon its decision at the demand of the Ombudsman who has no pretence of expertise or experience in a particular field how can the courts continue to extend curial deference to that agency?

### **SPECIFIC PROCEDURE TO RESPOND TO THE OMBUDSMAN**

In my respectful opinion, the following is a procedure which should be utilized where the Ombudsman has investigated a matter and recommends that an agency alter its decision:

- All agencies, except those excluded by a schedule to the *SPPA*, should be empowered to reconsider and vary a decision where they are of the opinion upon a review, that in making their decision they may have made an error in law or overlooked a material piece of evidence, which could have influenced their decision.
- The Ombudsman, if he has decided that the agency has erred in law or has failed to consider a material piece of evidence, can request in writing that the agency review and reconsider its decision.
- The agency may or may not decide to review its decision, but whatever it does, it shall promptly issue written reasons for changing or not changing its decision (assuming it possesses the explicit power to make changes). With respect, this procedure will clarify the dealings between the Ombudsman and the agencies, and will establish a balanced procedure. What the Ombudsman does, if he is advised in writing by the agency of its decision not to review or having reviewed will not alter its decision, is then up to the Ombudsman. If the legislature then wishes to reverse or alter a decision of one of its agents, it has every right to do so.

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- At present many tribunals, in fact most, if not all, are required to make their decisions after a public hearing. I would recommend that it be made clear by an amendment to the *SPPA* that where an agency has on review decided to change its decision, that it only be done after allowing at a public hearing any party affected by the change to make representations concerning the proposed change.

I believe that it is necessary to clarify whether there has to be a public hearing to carry out the report of the Ombudsman, even if the agency is willing to do so.

What no one should lose sight of is that many agency hearings involve not only the public interest but also more than one party. If the hearing in the first instance involved the public interest and there were more than the rights of the complainant at risk, and if the hearing was a public hearing (as defined in the *SPPA*), then in my opinion no agency can properly change its decision without holding a new public hearing in whole or in part. To do so could amount to a denial of natural justice, the pursuit of which hardly seems consistent with the role of the Ombudsman.

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## CONCLUSION

My problem with the Office of the Ombudsman is the way in which its business is sometimes carried out, and the demands often put upon the major decision-making agencies. I have no comment to make about how the Office deals with the civil service or decision-making by the civil service as a whole, but I have a concern for the relationship of the Office with certain agencies, because they are a special kind of decision-maker, and have a rather different relationship with the Legislature than most others.

Hearing agencies are in a very special category by themselves, partly because they were created specially by the Legislature to carry out their mandate in an area of expertise and partly because they possess a type of arm's length independence of decision-making which can easily be destroyed unless understood and guarded.

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## APPENDIX 6-1

### REGULATION 697

#### under the Ombudsman Act

Copy of recommendations 3, 4, 5, 6, 7 and 8 of the 7th Report of the Select Committee on the Ombudsman received and adopted by the Legislative Assembly on the 22nd day of November, 1979, as general rules for the guidance of the Ombudsman in the exercise of his duties under the *Ombudsman Act*.

Toronto, March 27, 1980.

I, Roderick Gilmour Lewis, of the City of Toronto in the County of York, Clerk of the Legislative Assembly of the Province of Ontario, by Royal Authority duly appointed, do hereby certify that the annexed paper is a true copy of recommendations 3, 4, 5, 6, 7 and 8 of the 7th Report of the Select Committee on the Ombudsman contained in the Votes and Proceedings No. 99 dated Thursday, November 22nd, 1979, which were received and adopted by the House on that date.

3. The Committee concurs in the recommendation that the Ombudsman shall, no later than three months after the end of his reporting period, table his Annual or Semi-Annual Report, as the case may be, with the Speaker of the Legislative Assembly. (*Page 31 and 32 of the Report*)
  4. The Committee concurs in the recommendation that:—
    - (i) The Ombudsman and his staff shall not, except where permitted by the *Ombudsman Act* in carrying out functions thereunder, disclose to any third party any information received by him or his staff while carrying out any of the functions of the Ombudsman under the *Ombudsman Act*, and
    - (ii) A member of the Ombudsman's staff carrying out Ombudsman functions under the *Ombudsman Act*, shall not express to anyone, other than to the Ombudsman or to his authorized delegate, his or her opinion, recommendation or other similar comments respecting the decision, recommendation, act or omission purported to have been committed by or on behalf of the governmental organization in question
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or respecting anything else arising out of the investigation of the complaint by the Ombudsman and his staff. *(Page 32 of the Report)*

5. The Committee concurs in the recommendation that preliminary investigations by the Ombudsman's office shall be limited to cases wherein further information is required by the Ombudsman or any member of his staff either to confirm a complaint or wherein immediate assistance of a complainant is required and the circumstances of the complaint make the immediate implementation of the procedural requirements of the *Ombudsman Act* impossible. Once the substance of the complaint has been confirmed by the Ombudsman or his staff or where the immediate disposition of the complaint is neither possible nor advisable, the requirements of the *Ombudsman Act* must be followed. *(Pages 32 and 33 of the Report)*
6. The Committee concurs in the recommendation where at any time during the course of an investigation it appears to the Ombudsman that there may be sufficient grounds for formulating opinions under subsections 22 (1) and (2) of the *Ombudsman Act* or of making any recommendations under subsection 22 (3) of the *Ombudsman Act*, which has the effect of altering, opposing or causing the original decision, recommendation, act or omission to be changed in any way, the Ombudsman shall give the governmental organization and any person who is identified or is capable of being identified as having made or committed or caused to be made or committed, as the case may be, the decision, recommendation, act or omission, an opportunity to make representations respecting the adverse report or recommendations either personally or by counsel. *(Pages 34 and 35 of the Report)*
7. The Committee concurs in the recommendation that all reports of the Ombudsman made to governmental organizations in accordance with section 22 of the *Ombudsman Act* shall contain opinions in the wording of subsection 22 (1) and recommendations within the wording of subsection 22 (3). *(Page 35 of the Report)*
8. The Committee concurs in the recommendation that in all cases where the Ombudsman has concluded that a response by a governmental organization to a report made by him under subsection 22 (3) of the *Ombudsman Act* is neither adequate nor appropriate, and where he wishes ultimately, if the matter cannot be resolved, to seek support for his recommendation in the Legislature, the report under subsection 22 (3) shall be referred to the Premier before it is referred to the Legislature. *(Page 35 of the Report)*

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## CHAPTER 7

### THE RECOVERY OF AGENCY HEARING COSTS

#### 7.0 INTRODUCTION

It costs about \$160,000,000 a year to operate the 91 regulatory agencies of the Province. The agencies recover about \$25,000,000 from application and licence fees and hearing costs. This leaves a deficit of about \$135,000,000 each year to be paid out of the general tax base.

There has not been a lot of public thought or expression given to how agencies should be financed; whether they should pay their own way, or be financed out of public funds.

This Chapter discusses how the 91 “regulatory” agencies in Ontario are financed. Do the agencies recover their cost of operations? Should agencies recover all or any of their expenses? From where should the expenses be recovered and by what means?

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#### 7.1 ASSUMPTIONS

In order to discuss this subject there are certain assumptions that should be stated.

FIRST — When the phrase “operating costs” is used, I am referring to the expenses an agency incurs to conduct a hearing. This phrase does not include party and party costs, nor interim costs of the parties nor intervenor funding. Nor do I include the costs to which a party is put to engage counsel and other assistance.

SECOND — Most agencies are financed out of the Consolidated Revenue Fund. Several agencies are financed by special constituent levies which are in essence user fees (See Appendix 7-1 at the end of this Chapter).

THIRD — The definition of operating costs may vary. I shall indicate whether I am

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speaking about the cost to operate the agency as a whole or whether I am speaking only of the costs to conduct the hearing operations of the agency.

FOURTH — I shall discuss only the 91 agencies which Management Board calls “regulatory”, listed in Appendix 2-1.

FIFTH — Whatever recovery is made, it shall be recovered for the Consolidated Revenue Fund and will not belong to the agency.

The first question to consider is whether any agency should be authorized to recover revenues for the Consolidated Revenue Fund or whether, like the criminal or civil courts, the agency system should be financed out of the pockets of all Ontario taxpayers.

I believe that there is a difference between the costs required to finance the judicial system and the costs required to finance the administrative agency system. There are real and historic reasons why there is no recovery, except for minimal filing fees, for the use of the courts. Similarly, there are real and historic reasons why there is and ought to be some recovery in some circumstances for the use of some agencies. For centuries the courts have never charged a hearing fee or even an application fee for a hearing. Historical theory dictates that the courts exist for the benefit of society as a whole and ought to be paid for by society as a whole. The courts develop the common law, the foundation of our entire society. While a single case may in the civil courts resolve a private dispute, it will also lay down a broad base for the law which governs all of us. This same argument does not hold true for administrative agencies. In fact, agencies are not even bound by their own decisions. Agency decisions are not building the same kind of legal base for our society and are thus, in terms of user fees, on an entirely different footing from the courts.

Furthermore, some agencies, on behalf of Parliaments, legislatures and Ministries, have levied user, licence and other fees and charges for many generations and many of them have recovered, for the same length of time, some or all of their own hearing expenses. This is another tradition, unique to administrative agencies. Agencies which serve a special interest do recover their operating costs from those who use the agency hearing process. There is also a history of dispute and issue resolution, conducted outside of the courts, namely arbitration, which is, in the opinion of many, another form of an administrative hearing. The

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hearings may be subject to the *Special Powers Procedure Act* and the *Arbitrations Act*, R.S.O.1980, c.25. The hearing costs of an arbitration are recovered from the users.

Therefore, I do not find on principle anything offensive, contradictory, or novel about the suggestion that *some* users of *some* agencies, should pay user fees, in the form of an application fee, a licence fee or a hearing fee. These user fees could be levied as a tax or an order to recover the operating costs of the agency and thereby improve the quality of the service available to the public. Clearly, in the areas of licensing and issuance of permits, functions which many agencies carry out, the beneficiary of the service should pay the cost.



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## 7.2 LEGISLATIVE AUTHORITY TO RECOVER HEARING EXPENSES

There is not the slightest doubt that regulatory agencies have traditionally recovered either all or some of the costs of regulation, not only in Ontario but throughout North America. The theory is that regulatory agencies are what is called “user-friendly” agencies, in that they exist to protect the individual as well as large segments of society, and accordingly, the user should pay for some or for all of the protection received.

A typical example of legislation at both the Federal and the provincial levels, which authorizes an agency to recover its hearing expenses is found in Section 28 of the *Ontario Energy Board Act*, R.S.O.1980, c.332 which reads as follows:

“28- (1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed at a sum certain or may be taxed.

(2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

(3) The Board may prescribe a scale under which such costs shall be taxed.

(4) In this section, the costs may include the costs of the Board, regard having being had to the time and expense of the Board.”

The theory behind most regulation is that it is the proxy for competition, which assures quality of service and fair pricing. The major point to be made about regulation is that there is a user fee charged for the hearing expenses, and as I shall explain later, many American governments have imposed a tax designed to recover the full cost of regulation as a substitute for recovering the expenses of hearings.

“Regulation”, like all other decision-making by an agency, involves the art of balancing the wants of the few with the needs of the many. There are many agencies before which are fought out private enterprise battles for the financial benefit of private investors but at public expense. A classic example would be the shopping centre battles that are fought before the Ontario Municipal Board (OMB) or the up-coming battles about private enterprise waste

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disposal sites which will come before the Environmental Assessment Board (EAB).

Although there may be a public interest in a general way in some of these hearings, there is also a very large private enterprise aspect which creates the hearing and the expense, but the private enterprise makes no contribution toward the expenses of the hearing.

There are many other agencies which fall into the same category. Not only do they have no application fee, or a totally unrealistic application fee that bears no resemblance to the cost of processing the application, but there is no recovery of any of the agencies' very substantial hearing expenses.

There is nothing novel about an agency or a Ministry passing on to those who are immediately benefitted by the exercise of a statutory power, the expenses of the exercise of that power. It is to be noted that there is a Management Board Directive providing for the recovery of the expenses of the Schedule 1 Agencies (see Directive 1-10-1). I have attached as Appendix 7-2, Chapter 97 of the *USA Administrative Procedures Act* dealing with the recovery of fees and charges which is instructional. The reader may also be interested in reviewing a Report published by The Administrative Conference of the States on User Fees dated December 1986 and a decision of the United States Supreme Court in *Skinner v Mid-American*, No 87-2098, decided April 25, 1989.

There is nothing unique about charging all members of a society (be they users or non-users) for a service that benefits the whole society even though many individuals obtain no benefit. A householder will pay an education tax all his life whether or not he has any children in school. Where the line is drawn between individual and society benefits or apportioning the benefits is a matter of judgment; a matter of balance.

In the next portion of this Chapter, I draw some lines.

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### 7.3 WHERE AND WHAT LINES SHOULD BE DRAWN?

To address whether and to what extent, and by whom, the hearing or operating costs of agencies should be paid, I believe that one has to look at the matter with a sense of balance. The answers are not black and white; they are grey!

One can attack the “any user should pay “ proposition, but one can also easily defend the proposition. Once one appreciates that all services have a cost, and that someone has to pay the costs, one starts to realize that choices have to be made between charging the users or charging everyone. There are in my opinion, areas where everyone ought to pay, but there are some areas where the user ought to pay, or at least pay *some* of the cost of the service rendered to him.

It is important to note that some agencies may be under-equipped, either in terms of people or hardware. With the demands made upon the Provincial Treasury, there may be no way to fund those shortcomings, without taking funds away from essential services such as health, welfare or education, unless we find a more equitable way to finance agency operations.

I believe that a very reasonable case can be made for charging for *some* kinds of services by *some* boards to *some* users. The balance of this section discusses what users, should pay for what uses, to what agencies and how that payment should be determined. The sole purpose of some agencies is to hold hearings whereas some agencies carry out in addition, other functions at the same premises.

When the agency mandate is built around hearings and nothing but hearings, and it is given the power to recover hearing expenses, the cost recovery should be based upon the whole cost of the agency and not just the direct cost of hearings. Where an agency performs a number of functions, including holding hearings, and where it has been given the discretion to recover hearing expenses, the cost recovery should relate to the specific expense of holding that specific hearing.

To determine which agencies should and which agencies should not recover agency hearing expenses, I believe that all agencies can easily be divided into two categories. **The first**

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**type** of agency is an agency which deals basically with personal rights and privileges. When this agency holds a hearing, it is to protect, grant or recover those rights and privileges. The cost of hearings before these agencies, with some exceptions, should be borne out of general tax revenues because there is a public interest to protect these rights and privileges.

Some of the agencies which deal primarily with individuals, should not initially be given the authority to recover hearing expenses and should therefore be “scheduled out” of the proposed amendments to the *SPPA*. There are about 60 agencies that should not, in my opinion, be given the authority to recover their hearing expenses. The agencies to be given the authority to recover hearing expenses are listed in Appendix 7-3. The schedule of these agencies can easily be adjusted by an Order in Council (OIC) in consultation with Management Board, the agencies, the Ministries and the Council.

Even after there has been agreement upon agencies to be included or excluded from the schedule, there will be a need to make a Regulation (a Directive will not be enough in my view) to establish legal limits as to when, from whom and what can be recovered as hearing expenses. The recovery of hearing expenses must not be viewed as a penalty, but rather as a cost-sharing.

There are those that may argue, and perhaps rightly, that all agencies should be given the authority to recover hearings expenses so long as it is done within Regulations approved by OIC.

Where an individual causes an appeal, and the appeal is found to be without merit, the costs of the hearing, could be recovered from the individual, bearing in mind the relative benefit sought, as opposed to the expense of hearing the appeal. It is better to trust an agency’s discretion than to distrust its initiative, particularly if an agency is granted, as I propose, the authority to review one of its own decisions, including recovery of its hearing expenses.

Appendix 7-3 excludes agencies such as the Social Assistance Review Board but I would include an agency such as the Commercial Registration Appeal Tribunal (CRAT). Obviously one would exclude the agencies which are already financed by a user fee.

**The second type** of agency deals with general matters affecting many people as opposed to



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an individual. Here the issue may well involve both the individual and the public. In cases where both private and public interests are involved, I believe that in some circumstances the individual should pay *some* or all of the hearing expenses, in others the expenses should be at the public expense. In other instances, the hearing expenses should be apportioned between individuals and the public.

Here again we are talking about balance. I believe that agencies, guided by appropriate Cost Regulations, have the ability, the knowledge and experience to make a proper allocation and appropriation of hearing expenses. Surely if agencies can be entrusted with the duty to make the decision before them, they can be trusted to make the appropriate decision to recover hearing expenses.

I shall discuss when an individual, a group or society as a whole, should pay all, or some of the hearing expenses.

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### 7.3.1 WHAT IS INCLUDED IN HEARING EXPENSES?

There are three questions about recovery of hearing or operating expenses to be considered.

- **What is included in expenses?**
- **How is the amount of the expense to be determined and by whom?**
- **Who should pay the expenses to be recovered?**

**What is included in expenses?** The expenses that I am discussing in this section are those which should be recovered by an agency after a hearing. The upper limit of the costs are those associated with the operational expense of conducting a hearing and not the costs of the full operation of the agency. Included in the hearing costs would be the following:

- **A charge for the salaries of the hearing officers on an hourly rate or a daily rate.** This is easily determined in the case of a member paid on a yearly salary by dividing the yearly rate by the deemed number of work days excluding holidays. The hourly rate is determined by taking the daily rate and dividing by seven. Where the member sits for less than three hours the charge should be for one half of a day or three hours. In many cases there will be time spent by the Chairman or other members in reviewing a decision before it is issued, and these charges should be added. Each agency should develop, if it does not now have, appropriate charges for these services.
- Added to the member charges should be the out of pocket charges associated with each member travelling to the hearing, the accommodation and meal charges. The members' charges will include the travel time, the preparation time, the hearing time and the time allotted to the writing and issuance of the decision.
- **Time charges for the staff which have worked directly on the file.** The simplest procedure is to create an arbitrary average time charge, for all staff time.

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- **Out of pocket costs borne by the agency in relation to that hearing or out-of-pocket expenses which have benefitted that hearing.** There can be a very important distinction between costs incurred for that hearing and costs incurred for all hearings, but part of which, in the discretion of the agency should be borne by that hearing (there is a SCC decision on this point, see *Bell Canada v CRTC*) [1986] 1 S.C.R.190. Such costs can include the payments to counsel, for reports etc.
  - **The cost of advertising the hearing.** This cost can be substantial even as high as \$50,000 per case, but likely a great deal less. These costs when totalled over a year, however, can be substantial for each agency.
  - **The cost of a court reporter or any recording and reproduction of the record or transcript.**
  - **An arbitrary amount for overhead.** Such a charge is common in any cost allocation and should be based on a percentage of the total cost of the agency, including rent, reduced to a daily or half daily rate. The reason one must charge an overhead rate is because there are a great many costs which are either fixed or variable which are difficult to trap and itemize. Also the use of an overhead charge can take the place of time-docketing which is difficult to monitor either for the staff or agency members.
  - **Translation costs.** Where there is an entire hearing in French and English (at a bare minimum of \$5000 per day extra), this charge will be added to the cost. Where only parts of the hearing are in French or a single translator is engaged the costs will be less than \$5000 extra per day.

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### 7.3.2 HOW IS THE EXPENSE AMOUNT DETERMINED AND BY WHOM?

I repeat that the above recovery will only apply when there are hearings, and only to the extent that the agency directs that the hearing expenses will be recovered. Even with this authority to recover hearing expenses, there may be insufficient recovery. Often the hearings scheduled, do not take place, but many of the expenses continue, hearing or no hearing. Some hearings may run a lot longer and cost a lot more than budgeted and so on. It will be seen at once that there will be a real cap on the amount which can be recovered from a user by the amount that actually goes into the calculation of the hearing expenses.

The directive to recover hearing expenses cannot be an open-ended discretion, and the ingredients can be made to vary from agency to agency by an OIC, if necessary. In addition, the recovery is tied to the individual agency and to the individual hearing. Put another way, there is a limit to the discretion given to an agency once it is permitted to recover the hearing expenses. The general structure of the recovery would be laid down by an OIC. What will then remain in the agency's hands will be whether to exercise the discretion, how to allot the recovery and who will be charged with the recovery.

As I mentioned earlier, there are a number of regulatory agencies in the Province that already recover some portion, or all of their expenses. For instance, the Ontario Energy Board, recovers 80% of its costs, the Ontario Automobile Insurance Board 100%, the Pension Commission 83%, and the Securities Commission 100%.

For truly "regulatory" agencies like the Energy Board or the Telephone Commission for example, I believe that the expense recovery should be based upon a formula relating to the total annual operating expenses of the agency. An alternative to such recovery is a flat yearly tax upon the supplier, based **at least** upon the cost of operating the agency.

There is also another type of agency where a hearing cost is not appropriate, in my



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opinion. An application fee should be imposed instead. The Assessment Review Board is such an agency. It receives approximately 250,000 applications per year. The cost to operate this agency is about \$4 million dollars a year. The Board does not charge an application fee. If only \$10 was charged for single applications and perhaps \$20 per unit for multiple applications, the Board could recover its expenses. I would recommend that some such charge should be authorized and imposed. The Assessment Review Board is not the only agency for which such comment and recommendation could be made.

Some agencies should charge both an application fee and recover their hearing expenses, crediting in proper cases, the former against the latter. Similarly some agencies should charge both an application fee and a licence fee, crediting the former against the latter if a licence application proceeds. In addition there are some agencies which should charge an application fee, a licence fee and where there is a hearing, recover the hearing expenses where the licensee has, in the opinion of the agency, caused some infraction which necessitated the hearing or the appeal.

The Liquor Licence Board of Ontario (LLBO), in my opinion, is a classic example of such an agency. The charges of the LLBO are not only low but are among the lowest on the continent. The LLBO with a budget of \$8,426,000 will recover only 75 % of its expenses. Not only should the LLBO recover in application fees enough to cover its budget, it should recover an additional \$20,000,000 in licence fees. If the LLBO recovered a greater proportion of its true costs, there could be provided better hardware which could not only reduce delay, but as well improve service and reduce costs.

I would recommend that proper application fees and adequate licence fees be implemented for the LLBO and that the LLBO recover its hearing expenses where it deems it is appropriate. The liquor licence fee does not even begin to recover the cost of administering the licences. One may pay about \$20 for a licence but it costs about \$750 to process. Licence fees produce about \$600,000 a year in revenue when they could well produce about \$20,000,000. The LLBO is not only a potential money-maker, and but is a good example of an agency that is not only not paying its way, but which could be making a contribution to the cost of social services such as day-care and hospitals.

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All scheduled agencies should be able to establish an application fee, even if they also charge a licence fee or a hearing fee because there are many applications which are abandoned or which do not proceed.

The hearing or operating costs of many agencies can be recovered by an assortment of charges and fees which relate to the services rendered. I should observe that the scheme of the recommendations which I propose for the *SPPA*, *would include the power to recover agency costs, agency hearing expenses and various licence and application fees. This would be accomplished by a general authority to do so contained in the amendments to the SPPA* set forth in Chapter Nine.

Of the 91 agencies, it would appear to me that:

- about 16 agencies should be entitled by a schedule to charge an application fee.
- about 3 agencies should be entitled by a schedule to charge a licence or permit fee.
- about 27 agencies should be entitled to recover some or all of their hearing expenses as they may determine.

The licence fee should be a revenue producer and should bear little or no relationship to the cost of operating the agency. Some agencies have not adjusted their fees in 10 years. An interesting fact is that there are successful licence consultants, who charge their clients \$2000 to fill out licence application forms. Yet, there is no application fee and if the licence is granted, there is a charge of \$20 for a one year licence; of which the cost to issue is about 400 times the fee.

There is another critical issue that must be addressed. There are new methods to resolve public hearings and very clear ways to reduce delay, which agencies could employ but for the initial cost of such procedures. One ought not to suggest that this additional revenue is merely for the sake of adding to the Consolidated Revenue Fund. It will, if wisely expended, substantially improve the speed and quality of the administrative agency system that now exists. What many people overlook is that “justice delayed is justice denied”. The

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turn-around time of many agencies is far too great and many new dispute resolution techniques require mediation and conciliation officers and other resources which can not be attempted without additional funding.

### **7.3.3 WHO SHOULD PAY HEARING COSTS WHERE A DISCRETION IS GIVEN?**

Who should pay the cost of hearings? Assuming an agency has been empowered to issue an order directing that a certain party or person shall pay or contribute to the hearing expenses of a matter being heard, the agency, may recover the hearing expenses from:

- (i) Any party or group which has voluntarily taken part in the hearing; and
- (ii) Any person or group which has materially benefitted from the decision.

The meaning of the first category is clear. The meaning of the second category requires some discussion. There are many agencies which hold hearings that have been occasioned by an application of an individual or a group (including a municipality), where there is a very clear benefit, if the application is granted, to some particular individual or group (or even a municipality). This benefit exceeds the general benefit to society as a whole or even the general community within which the application is sourced. Some hearings before the Ontario Municipal Board and the Environmental Assessment Board are classic examples of this. The agency should have the power, and should be instructed, in a proper case, to recover the hearing expenses of the application.

Perhaps a typical example will suffice. There have been many matters conducted before the OMB which have cost the general taxpayers millions of dollars paid out of the Consolidated Revenue Fund when the basic issue was whether this company or that company would be able to build a major project at this corner of this highway or that corner of that highway. The Municipal Council may oppose or approve the proposal. The proposal before the OMB may have been made by the municipality, or by the proponent of the project or by a

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competitor opposing the project, or by someone else opposing the project, for any one of a number of reasons.

When the OMB decides, it will generally either allow or disallow the proposal. Some party will clearly benefit from the decision. I believe that the OMB should be obligated to recover its hearing expenses if it comes to the conclusion that there is a substantial benefit bestowed upon one or more of the parties. In such a case, the Board should direct that certain parties should pay into the Consolidated Revenue Fund the hearing expenses, in whatever proportions the OMB determines appropriate. Again, I would like to observe that the OMB is but one of a number of agencies about which the same kind of observations could be made. I might add that such an authority may have a very salutary effect upon the length of the hearing and the evidence presented, if the parties, know that they may have to pay some or all of the hearing expenses. How the parties have contributed to a carefully crafted and timely hearing, would have an influence upon how the agency allocates the recovery of the hearing expenses.

Some agencies hold what are known as generic hearings, whether public or paper, the result of which may be a substantial benefit to an individual, a class, a group or an industry. In such a case, an agency should be empowered to recover the hearing expenses from those who will benefit from such a hearing, or even to reserve the recovery for some hearing in the future.

Any legislation, which may be drafted dealing with the recovery of hearing expenses will have to be carefully crafted to take into consideration a number of court decisions dealing with costs and expenses. Guidelines should be developed concerning from whom, and under what circumstances, there should be a recovery of hearing costs. I believe that the Guidelines should be general in nature to allow some flexibility in the hands of the agencies and to allow each agency to add certain rules and policies of its own which are particular to the agency involved. The Council which I have recommended would be in a position to assist in the development of these Guidelines. Once the Guidelines have been developed they might be "gazetted" so that they are publicly known in English and French.

The amount of the hearing expenses are easily determined and would not be subject to the



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discretion of the agency, but would be determined by a taxing officer for each agency. Each agency would designate a person in the agency as its taxing officer.

### 7.3.4 GENERAL CONCLUSIONS

1. Some agencies should have the discretion to issue an order recovering hearing expenses according to published Guidelines approved by Management Board, the Ministry and agency involved.
2. 51 agencies should not have such authority;
3. 16 agencies should have the power to charge application fees.
4. 3 agencies should have the authority to issue licences. Such fee shall be determined by Management Board in consultation with the Ministry involved.
5. A true “regulatory” agency should recover its entire budget either by a Treasury tax or assessment, against the regulated sector on a yearly basis, or the agency should be directed to recover 100% of its budget from participants at hearings. Where an agency carries out several functions, the recovery of hearing expenses should relate to the specific hearing and not to the other operating costs of the agency. Fees of all agencies should be adjusted each year to allow for increased costs as well as for improved quality or type of service.
6. An appellate agency should be authorized to recover its hearing expenses from the loser of the appeal where it deems that appropriate.
7. Where the decision of an agency confers a benefit upon a person, the individual should contribute from zero to 100% of the hearing expenses of the agency as determined by it.

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8. Each agency which is given the power to recover hearing expenses shall also have the power to declare some person, a party, after notice, and after giving an adequate opportunity to participate.

Inherent in this Chapter is the concept that the burden of the cost of the operations of an agency ought to be borne by those who benefit, to the extent of such benefit, except where the benefits are derived legislatively as a personal benefit or right. Inherent also is the goal to make ministries and agencies part of the drive to make agencies more productive and cost efficient.

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## APPENDIX 7-1

### SELF-FINANCING AGENCIES

1. Ontario Securities Commission
2. Ontario Automobile Insurance Board
3. Worker's Compensation Appeals Tribunal
4. Grain Financial Protection Board
5. Vegetable Financial Protection Board
6. Potato Financial Protection Board
7. Beef Financial Protection Board

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## APPENDIX 7-2

### CHAPTER 97 — MISCELLANEOUS

#### Sec.

9701. Fees and charges for Government services and things of value.

9702. Investment of trust funds.

#### **9701. FEES AND CHARGES FOR GOVERNMENT AND THINGS OF VALUE**

- (a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.
- (b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be —
  - (1) fair; and
  - (2) based on —
    - (A) the costs of the Government;
    - (B) the value of the service or thing to the recipient;
    - (C) public policy or interest served; and
    - (D) other relevant facts.
- (c) This section does not affect a law of the United States —
  - (1) prohibiting the determination and collection of charges and the disposition of those charges; and
  - (2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 1051.)

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## HISTORICAL AND REVISION NOTES

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Revised Section	Source (U.S. Code)	Source (Statutes at Large)
9701 . . . . .	31:483a . . . . .	Aug. 31, 1951, ch. 376, 501, 65 Stat. 290.

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## EXPLANATORY NOTES

In the section, the words “agency (except a mixed-ownership Government corporation)” are substituted for “Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945 [31 U.S.C. 841 et seq.]” because of section 101 of the revised title [section 101 of this title] and for consistency.

In subsection (a), the words “each service or thing of value provided” are substituted for “any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued” for consistency and to eliminate unnecessary words. The words “(including groups, associations, organizations, partnerships, corporations, or businesses)” are omitted as being included in “person” under 1:1 [section 1 of Title 1, General Provisions].

In subsection (b), before clause (1), the words “may prescribe regulations establishing the charge for a service or thing of value provided by the agency” are substituted for “is authorized by regulation . . . to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one” for consistency, to eliminate unnecessary words, and because of the restatement. In clause (1), the words “and equitable” are omitted as being included in “fair”. In clause (2)(A), the words “direct and indirect” are omitted as surplus. In clause (2)(B), the words “of the service or thing” are added for clarity. In clause (2)(D), the words “and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts” are omitted as unnecessary because of section 3302(a) of this title [section 3302(a) of this title].

Subsection (c) is substituted for 31:483a [former section 483a of this title] (provisos) for clarity and to eliminate unnecessary words.

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## CROSS REFERENCES

Rates established in conformity with this section for special interpretation services, see section 1828 of Title 28, Judiciary and Judicial Procedure.

Sale of water located in Grand Canyon National Park in conformity with requirements of this section, see section 222 of Title 16, Conservation.

## LIBRARY REFERENCES

United States      39(3). C.J.S. United States      44.

## NOTES OF DECISIONS

Agencies entitled to asses fees    6

Beneficiary of services, persons subject to assessment    8

Constitutionality    1

Costs to agency as factor determining assessment of fees    11

Due process    4

Effective date of fee    5

Factors determining assessment of fees

    Generally    10

    Costs to agency    11

    Value to recipient    12

Local governments, persons subject to assessment    9

Persons subject to assessment

    Generally    7

    Beneficiary of services    8

    State and local governments    9

Purpose    2

Refunds    14

Retroactive effect of judicial decisions    3

State and local governments, persons subject to assessment    9

Statement of costs or services    13

Taxes    15

Value to recipient as factor determining assessment of fees    12

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## 1. CONSTITUTIONALITY

Former section 483a of this title was not an unconstitutional delegation of legislative power, and provided constitutional essentials for valid delegation of legislative power in that it stated legislative object, method of achievement, and guiding standards for administrator.

*Aeronautical Radio, Inc. v. U.S.*, C.A.7, 1964, 335 F.2d 304, certiorari denied 85 S.Ct. 658, 379 U.S. 966, 13 L.Ed.2d 559.

## 2. PURPOSE

Former section 483a of this title was enacted to allow federal agencies to recoup costs from identifiable “special beneficiaries” where the services rendered inured to the benefit of special recipients not the general public. *New England Power Co. v. Federal Power Commission*, 1972, 467 F.2d 425, 151 U.S. App.D.C. 371, affirmed 94 S.Ct. 1151, 415 U.S. 345, 39 L.Ed.2d 383.

## 3. RETROACTIVE EFFECT OF JUDICIAL DECISIONS

Decision of Supreme Court that Federal Communications Commission’s 1970 fee schedule was invalid was applicable retroactively and broadcasters who applied for refunds of fees paid were entitled to refunds in amount that 1970 fees were in excess of fees authorized by law, and not in amount in excess of amount payable under 1966 fee schedule. *National Ass’n of Broadcasters v. F.C.C.*, 1976, 554 F.2d 1118, 180 U.S.App. D.C. 259.

## 4. DUE PROCESS

Grazing permits held by livestock operators were not an interest protected by U.S.C.A. Const.Amend. 5 against taking by government and action taken by Secretary of Interior and Secretary of Agriculture

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## APPENDIX 7-3

	Recover Hearing Costs	Charge Application Fee	Charge License Fee	Charge Hearing Fee
<b>AGRICULTURE AND FOOD</b>				
Agriculture Licensing & Registration Board	N			
Beginning Farmer Assistance Program Review Committee	N			
Farm Products Appeal Tribunal	N			
Farm Tax Rebate Appeal Board	N			
Grain Financial Protection Board	N			
Livestock Financial Protection Board	N			
Ontario Crop Insurance Arbitration Board	N			
Ontario Drainage Tribunal	N			
Ontario Family Farm Interest Rate Reduction Appeal Board	N			
Ontario Farm Machinery Board	N			
Ontario Farm Products Marketing Commission	N			
Potato Financial Protection Board	N			
Processing Vegetable Financial Protection Board	N			
Prov. Decision Committee Ont. Farm Adj. Assistance	N			
The Produce Arbitration Board	N			
Wolf Damage Assessment Board	N			
<b>ATTORNEY GENERAL</b>				
Assessment Review Board		Y		
Board of Negotiation	N			
Criminal Injuries Compensation Board	N			
Ontario Municipal Board	Y	Y		
Statutory Powers Procedure Rules Committee	N			
<b>COLLEGES AND UNIVERSITIES</b>				
College Relations Commission	N			
Ontario Student Assistance Program Appeal Board	N			
Private Vocation School Review Board	DISBAND			
<b>COMMUNITY AND SOCIAL SERVICES</b>				
Child & Family Services Review Board	N			
Social Assistance Review Board	N			
Custody Review Board	N			



## APPENDIX 7-3

	Recover Hearing Costs	Charge Application Fee	Charge License Fee	Charge Hearing Fee
<b>CONSUMER AND COMMERCIAL RELATIONS</b>				
Commercial Registration Appeal Tribunal	Y	Y		
Liquor Licence Board of Ontario	Y	Y	Y	
Ontario Film Review Board				Y
Ontario Racing Commission	Y	Y	Y	Y
Operating Engineers - Board of Review				
<b>CORRECTIONAL SERVICES</b>				
Ontario Board of Parole	N			
<b>CULTURE AND COMMUNICATIONS</b>				
Conservation Review Board Heritage Branch	N			
Ontario Telephone Service Commission	Y			
<b>EDUCATION</b>				
Education Relations Commission	N			
Languages of Instruction Commission of Ontario	N			
Ontario/Regional Special Education (English) Tribunals	N			
<b>ENERGY</b>				
Board of Valuation	N			
Ontario Energy Board	Y	Y		
<b>ENVIRONMENT</b>				
Board of Negotiation	N			
Environmental Appeal Board	Y			
Environmental Assessment Board	Y	Y		
Environmental Compensation Corporation	Y	Y		

## APPENDIX 7-3

	Recover Hearing Costs	Charge Application Fee	Charge License Fee	Charge Hearing Fee
<b>FINANCIAL INSTITUTIONS</b>				
Ontario Automobile Insurance Board	Y	Y		
Ontario Securities Commission	Y	Y		
Pension Commission of Ontario	Y	Y		
<b>HEALTH</b>				
Board of Directors - Chiropractic	N			
Board of Directors - Osteopathy	N			
Board of Regents - Chiropody Act	N			
Dentistry Review Committee	N			
Denture Therapy Appeal Board	Y			
Funeral Services Review Board	Y			
Health Disciplines Board	N			
Health Facilities Appeal Board	Y			
Health Protection Appeal Board	Y			
Health Services Appeal Board	N			
Hospital Appeal Board	Y			
Laboratory Review Board	Y			
Medical Eligibility Committee	N			
Nursing Homes Review	N			
Optometry Review Committee	N			
Psychiatric Facilities Review Board	N			
<b>HOUSING</b>				
Building Code Commission	Y			
Building Materials Evaluation Commission	Y			
Rent Review Hearings Board	Y	Y		
Residential Tenancy Commission	DISBAND			
<b>LABOUR</b>				
Ontario Crown Employees Grievance Settlement Board	N			
Ontario Labour Relations Board	Y			
Ontario Public Service Labour Relations Tribunal	N			
Pay Equity Hearings Tribunal	Y	Y		
Workers' Compensation Appeals Tribunal	S/S			

## APPENDIX 7-3

	Recover Hearing Costs	Charge Application Fee	Charge License Fee	Charge Hearing Fee
<b>MANAGEMENT BOARD OF CABINET</b>				
Civil Service Commission	N			
Ontario Provincial Police Grievance Board	N			
Ontario Provincial Police Negotiating Committee	N			
Public Service Classification Rating Committee	N			
Public Service Grievance Board	N			
<b>MUNICIPAL AFFAIRS</b>				
Niagara Escarpment Commission	Y	Y		
<b>NATURAL RESOURCES</b>				
Crown Timber Board of Examiners	N			
Game and Fish Hearing Board	N			
Lake of the Woods Control Board	N			
<b>SOLICITOR GENERAL</b>				
Animal Care Review Board	N			
Fire Code Commission	Y			
Ontario Police Arbitration Commission	N			
Ontario Police Commission	N			
<b>TRANSPORTATION</b>				
Licence Suspension Appeal Board	Y	Y		
Ontario Highway Transport Board	Y	Y	Y	

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## CHAPTER 8

### NEEDED STRUCTURAL CHANGES

#### 8.0 INTRODUCTION

One of the major obstacles to consensus on the requirements of Ontario agencies is the belief that we are all talking about the same thing. We all look at administrative agencies and assume that what we see is what everyone else sees. This is not the case.

In terms of administrative agencies, there is a large viewing audience. It includes judges sitting in court, lawyers who participate in hearings before agencies, politicians who design the legislative mandate of agencies and then deal with how the agencies carry it out, bureaucrats to whom the agencies are accountable, the public which seeks out agencies to resolve problems, the academics who describe, often from a theoretical perspective, how agencies ought to function, and lastly the media, which has its own perspective and its own constituency.

Each segment of this viewing audience believes that its perspective or view of agencies is common to all. We assume that everyone looks at agencies in the same way and that everyone will describe them and expect them to operate in the same fashion. The fact is that we are all products of our environment and our own perceptions. So, the truth of the matter is that there is little agreement about why agencies were created in the first place; what goals they should achieve; what measurements should be used to judge their performance. Nor is there agreement about what authority the agencies require to carry out this array of disharmonious views.

Quite apart from these irreconciled points of view, there are three additional demands put on the agency system which can be at odds with this amalgam of views and with each other. These are the demands of Management Board that the agency system be cost effective and efficient; the demands of the Attorney General as the Chief Law Officer that the system be fair and just in the performance of its mandate; and the individual requirements of the 20 Ministries to which the 91 agencies are accountable.



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In chapters 8 and 9, I have proposed a number of amendments to the Statutory Powers Procedure Act. Some of the amendments deal with structural issues, including the establishment of a Council (chapter 8) and some deal with additional or clarified powers (chapter 9).

I have included in Appendix 8-1 a draft of the SPPA as it would appear if amended in accordance with my recommendations.

In chapters 8 and 9, I discuss in detail my proposed amendments. To assist the reader the amendments dealing with recommendations are set out in the text. The section and the number of the proposed amendment in the text conforms with the section number of the SPPA in Appendix 8-1.

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## 8.1 AMALGAMATION OR ELIMINATION OF AGENCIES

While reviewing the structure of Ontario agencies and the authority which they require to fulfil their goals, it should be considered, even if only briefly, whether some of the 91 agencies could be eliminated and whether some could be combined.

We have about 580 agencies in Ontario. Since 1980, we have been creating agencies at the rate of ten per year while terminating or amalgamating only about one agency every two years. Elsewhere I have discussed the need to monitor more carefully the creation of new, and the sunseting of old, agencies.

Looking at the question of amalgamation or elimination of an agency, one should bear in mind the answer to a number of questions.

- Is the agency carrying out a function which needs to be carried out any longer?
- Could the operations of the agency be combined with those of some other agency?
- What are the political and practical ramifications of elimination or amalgamation?
- What, if any, are the cost savings of either elimination or amalgamation?

Any change would require a different arrangement of staff. Would there be a need for more or less staff, and how would the staff be relocated? Would the facilities required be adequate and what would it cost to combine or eliminate? How would the public perceive the change relative to the alleged saving, if any? To which Ministry would the amalgamated agency report? Could the agency, which is a candidate for elimination be reorganized to carry out another function which might otherwise have caused the creation of a new agency? Instead of elimination, would it be better to reorient the agency and restructure it? If two agencies are considered for amalgamation, are their tasks really compatible, or would it be like mixing oil and water, with an inevitable deterioration in public service? Has there been an impartial

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and competent cost analysis study done by someone who really understands the nature of both or many agencies?

The above are but a few of the specific questions to be asked before venturing into this area of enquiry.

Having stated the above, I would recommend that the Government give some consideration to the following:

**First, I recommend that the government give consideration to combining Gas Regulation, Telephone Regulation, Highway Transport Regulation and the present functions of the Ontario Energy Board in relation to Ontario Hydro into one Ontario Public Utilities Commission.** In many provinces, and states of the USA, rate setting and industry monitoring is carried out by one Public Utilities Commission. Many PUB's or PUC's combine water service, garbage service, telephone, electricity, gas, highway transport, radio and even television.

However, there are a number of factors to consider before making any such decision.

- The Government may decide either before or after this Report is filed to alter the role of the Ontario Energy Board in relation to Ontario Hydro. This might impact considerably on the Government's policy in this matter.
- The legislation both Federally and Provincially is changing at the present time, in relation to the Highway Traffic Board's future provincial duties. The Government is in a better position than am I to assess what difference that will make to the existing Board.
- The Ontario Telephone Commission is presently in a very delicate position. A major communications case was heard by the Supreme Court of Canada some months ago. The decision on this case may change the face of regulation not only in Canada, but particularly in Ontario for the Ontario Telephone Commission. If more authority is given to the Province in this field through negotiation with the Federal Government,

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as a result of the decision of the SCC, expected momentarily, the Telephone Commission, in my opinion, should be restructured.

If, on the other hand, the jurisdiction does not change, I believe that the Government should consider joining the Telephone Commission with the Energy Board to create a new Ontario Public Utilities Commission. I received a Memorandum from the Ontario Telephone Association (representing all of the small telephone companies regulated by the Commission), which proposes that the Commission would be strengthened if joined with the OEB.

**Second, I would recommend that the Government consider establishing one overall Licensing and License Regulating Commission in Ontario, to combine many of the licensing functions that are spread across so many agencies.** There is a great similarity between the mandate and operations of licensing agencies. I believe that such an amalgamation could be cost efficient and improve the quality of service offered to the public by these agencies.

**Third, the Private Vocational School Review Board should be disbanded.** It has not convened for several years and has had only one matter referred to it in three years. I would recommend that there be a report from both the Chair of the Board and the Minister to make a decision on this matter. It is not just a question of economics but whether the efforts of the Treasurer and the Chairman of Management Board in trying to maintain a cost effective bureaucracy are to be taken seriously.

**Fourth, the mandate of the Commercial Registration Appeal Tribunal should be amended.** The Tribunal, which issued 61 decisions in 1986, operates under about 17 different Acts. One of the important functions of the Tribunal is to rehear appeals from decisions of the Liquor License Board. I do not believe that it is necessary to have this tribunal hear appeals from the LLBO and particularly not *de novo*. *De novo* appeals should be abolished in this era given the existence of the Ombudsman's Office, the Human Rights Commission, Judicial Review, court appeals, and a new power to rehear. To have one administrative agency hear appeals from other administrative agencies, *de novo* and on the facts, is expensive, time consuming and invites protracted unnecessary delay.



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**Fifth, the Public Service Grievance Board and the Crown Employees Grievance Settlement Board should be combined because of the similarity of function.** Individual members of individual panels would be chosen on the basis of whether the matter was “union” or “non-union”. I recommend renaming the agency as the Public Service and Crown Employees Grievance Board. I say in passing that I think that conciliation and mediation take a back seat to confrontation when a union and employee are guaranteed a hearing before this agency at the taxpayer’s expense and at no risk to themselves. Our whole labour movement is built upon conciliation, mediation and arbitration which are final. To have appeals from arbitrators decisions as a right is undesirable and in any event it should not be at the taxpayers expense.

**Sixth, the College Relations Commission and the Education Relations Commission should be combined.** The members and staff of both commissions are the same, even though the two commissions operate under two acts for two different Ministries. The cost saving may not be significant but the side effects of trying to streamline some of the burgeoning bundle of agencies would be noteworthy.

**Seventh, I recommend that consideration be given to reducing the number of environmental agencies.** In Ontario five agencies and one Hearing Officer deal with planning and the environment matters. First, there is the Ontario Municipal Board (OMB) which considers the environment in planning matters. Second, there is the Environmental Assessment Board which looks at applications which affect environment and planning. Third, there is the Environmental Appeal Board which hears appeals from decisions made by civil servants on environmental matters. Fourth, there is the Environmental Compensation Corporation which fixes the compensation due to persons in certain environmental matters. Fifth, there is the Niagara Escarpment Commission which deals with environmental and planning matters within the Escarpment. This Commission was to have had a limited life. Its duties were to pass to the constituent municipalities and regions which make up the Escarpment, but it is still operational. And last, the Minister of Municipal Affairs has appointed by an OIC, a full-time Hearing Officer to hear environmental planning matters within the Escarpment. This appointment, in my view, by the Minister, was and remains illegal because the Act only permits the Minister to make case by case appointments.

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I have serious doubts that all of the above are needed.

I do not, however, recommend joining the Ontario Municipal Board and the Environmental Assessment Board (EAB) for two very important reasons.

- (i) When a case comes before the OMB, the onus is upon the opponent of the proposal because of the philosophy underlying the *Planning Act*, but when a matter comes before the EAB, the onus is upon the proponent.
- (ii) If the EAB was joined with the OMB, I believe that this would be seen by the public as an effort to down-grade rather than elevate the importance of environmental concerns.

Presently when a proposal has both planning and environmental overtones, a Joint Board composed of members of both the OMB and the EAB can be created. This is not unusual, but a weakness of the legislation dictates that a Joint Board can only be legally created where asked for by a proponent. (There should be many more joint boards among many agencies when the circumstances warrant. I have, therefore, proposed an amendment to the *SPPA* which would allow joint panels to be created under more circumstances).

Whether or not there is an amalgamation of the OMB and the EAB, there could be some amalgamation of the Niagara Escarpment Commission with either the Ontario Municipal Board or the Environmental Assessment Board. In any event, I do not believe that there is a need to have a Hearing Officer when two trained agencies are more than able to undertake this kind of hearing.

Lastly, I believe that the OMB could well carry out the function of the Environmental Compensation Corporation and that the Environmental Assessment Board should carry out the function of the Environmental Appeal Board.

**Eighth, I have not mentioned the possibility of changing the number and mandate of some of the Health Discipline Boards because that matter has been subject to a special study by Mr. Allan Schwartz.** This special study has now recommended a number of important changes, which are long overdue.

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## 8.2 PROGRAM EVALUATION

Closely associated to the idea of “sunset review”, is the notion of program evaluation. The Management Board Secretariat has used the term “Activity Review”, in Directive 1-9 to address this policy issue as it relates to ministries and agencies. According to the Directive, such reviews require ministries to both assess their own programs and to include the review of programs as a component of the sunset review of agencies. The primary objective of the exercise is to determine whether the “program” is still relevant. The focus is on the actual need for the program, as opposed to whether it is being managed efficiently and effectively. Once the need for the program’s continuation is established, then analysis of whether it is being carried out efficiently and effectively can be undertaken.

**Essentially, program evaluation calls into question three main issues:**

- i) the need for the program;**
- ii) whether it should continue in its present form or should adopt a different framework for its service delivery (due perhaps to changes in its operating environment);**
- iii) whether it is cost effective.**

There are increasing demands to provide timely data to assist government, agencies, planners and service providers.

Program evaluation should involve the systematic gathering of verifiable information on a program, and concrete evidence on its results and cost effectiveness. The essential purpose should be to periodically produce credible, timely, useful and objective findings on programs appropriate for resource allocation, program improvement and accountability.

In this regard, program evaluation has evolved from a focus on resources used, such as the amount of dollars spent and the number of people employed, to examining how resources are used, the purpose of programs and their impact and effects on society. Essentially, in an

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increasingly complex environment, the attempt is to improve social and economic conditions. Program evaluation can be an important source of more and better information on what is being achieved through public expenditures and government regulation. It is important to understand and appreciate that program evaluation is part of good management and responsible government.

The Council would provide as needed, advice and assistance in this undertaking. While it may be desirable for different agencies to set up this function differently, the general features of each should be similar and all should reflect certain principles. Through the established use of program evaluation, Chairs and senior management will have available the necessary information to improve programs, and to justify public monies spent.

**Therefore, I would recommend that each regulatory agency, and its performance under its Act, should be subject to a mandatory periodic review.** Such a periodic review of the functions and performance of agencies, I would argue, should be comprehensive and systematic. It should be the responsibility of Management Board, the Chairs, and the Ministries, to ensure that this task is carried out, to ensure that effective service delivery is being extended to the public.

**I would recommend that the Government consider directing that a periodic review be carried out not less than once every 4 years.** While the mandatory periodic review should not necessarily include the automatic termination of an agency, it should not preclude the termination of an agency either. A requirement of this type of review would address, to a great extent, the concern often expressed, that the statutory mandates of administrative agencies have often outlived their usefulness.

## **METHODS OF EVALUATION**

An important issue for consideration is the appropriate method for evaluating the performance of administrative agencies. This method should include the following:

- Credible evaluations of the performance of agencies should generally be done externally, and with substantial input from the private sector (broadly defined to



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- include those groups and individuals affected by agency decisions and regulations). It is important to recognize that feedback from agency “clientele” is crucial in evaluating agency performance.
  - Successful evaluation of agency performance requires a clear identification of the objectives against which performance is to be assessed. Many agency statutes do not provide such a clear statement of objectives.
  - Following the identification of objectives, the results of agency activity should be identified, measured and compared to the extent possible with the results had the agency not existed.
  - To assess the effectiveness of agency performance, it is crucial to evaluate not only any benefits arising from the results of agency activity but also estimate the total costs associated with the operation of the agency, including the direct and indirect costs imposed on the clientele by agency decisions and regulations. In practice, the most important gaps in the government’s existing information with respect to agencies relates to the lack of information concerning the costs imposed on the private sector.
  - In addition to assessing effectiveness, evaluation of agency performance should also include an assessment of its efficiency, not only in terms of minimizing operating costs but also in terms of whether its process is perceived as fair.

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## 8.3 AGENCY SUNSETTING AND PROGRAM EVALUATION

### SUNSETTING

“Sunsetting” is an exercise that places upon an agency, which exists or one which is being created, a date by which its continued existence must be reviewed or it will expire.

The “sunset” provision in Bill 174 introduced in June 1988 is a classic example.

“Section 16-(1) This part is repealed on the day that is three years after the day it comes into force or on such day thereafter as is named by proclamation of the Lieutenant Governor.”

An alternative is to require that the agency mandate will come to an end, unless on or before a certain date the Legislature extends the life of the agency by legislation.

Management Board in its Directive concerning Administrative Agencies Section 6-3-2, provides:

“Any agency being established with a short-term, clearly defined mandate must include a termination date in its constituting instrument.”

“All advisory and operational agencies not preparing annual corporate plans must, at least once every five years, be subject to a Sunset Review indicating whether any mandate or structural revisions, termination, amalgamation with another organization or privatization should be considered.”

“The Sunset Review must be undertaken by the responsible ministry with the involvement of the agency chairperson.”

“The Minister’s recommendations must be submitted to Management Board and Cabinet for review and approval.”

“When the mandate of an agency has an impact on other ministries in addition to the responsible ministry, the Sunset Review must be considered by the relevant policy committee of Cabinet prior to consideration by Management Board and Cabinet.”

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Any exemptions to this Sunset Review process must have approval of the Management Board.

“The mandate of and the need for regulatory agencies must be reviewed whenever any amendments to the constituting instrument (usually legislation) are being considered or undertaken by the responsible ministry.”

The answers to the Questionnaire referred to in Chapter Two, my interviews and findings suggest that the Directive has not been closely followed, particularly the last paragraph of the Directive.

- There have been 77 new agencies created since 1980 (10 per year) of which 15 could be classed as “Regulatory”.
- Since 1980 when sunseting began, about 5 agencies out of 580 have actually been terminated while about 10 have been merged with other agencies.
- A substantial number of agencies have had their legislation amended since 1980, but I was able to find only one agency which had been terminated during that process.

Sunseting is a sound practice for an assortment of reasons.

1. When there is a sunset provision attached at the creation of an agency, it is clear to one and all from the beginning, that the agency may not continue, unless it can justify its continuance. Surely this is not an unreasonable basis upon which to create programs and agencies alike.
2. Sunset provisions enable a government to act realistically in relation to agencies and Ministries in the future, when the time comes to justify or expire them. Ministries have to make some real choices about reducing the financial load before creating new agencies.

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3. Even though an agency may appreciate that it likely will not be terminated, it is prodded to justifying its continuation through its entire life and not with a final deathbed burst of self-justification.
  4. Sunset clauses make the political reality of a sunset easier to handle for a Government or Ministry, whether it be termination or merger.
  5. Sunset clauses give a Ministry or Government an excellent opportunity, once every 3 to 5 years to review an agency through the eyes of the Committee on Agencies and the responsible Ministry, in order to determine if there is a more effective way to deliver the same or better service to the public.

There is no question that agency legislation is being amended without consulting the agency Chairman and without a sunset review taking place in a meaningful way. If the Government wishes to control the urge to create more and more agencies, a structure should be created that vets the agencies at a top level, as legislation is sought or the sunset date approaches. It is not enough to require something to be filed with a clerk that is not enforced at a senior level.

In addition, I recommend the following:

**First**—The agencies themselves should be required to file on a revolving basis, a Justification Document with the Ministry and with Management Board as well, which requires each agency to self-justify. This is an excellent act of self-discipline and would be a source of internal comment by the very people who have to operate agencies under working conditions. The Document should be filed with the Council as well, which would comment, if requested by Management Board or the involved ministry.

**Second**—The Ministry to which each agency is responsible would also prepare its own Justification Documents for each agency. Again, this is an excellent act of self-discipline by which the Ministries would make a thorough review of their agencies. This Justification Document can serve a number of uses. It can be the basis for amending the Memorandum of Understanding, the description of the agency, its members as described in Chapter Eight



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or the legislated mandate of each specific agency.

**Third**—A new Standing Committee on Administrative Agencies should be created which would deal specifically with administrative agencies. Presently, there is such a Standing Committee on Procedural Affairs and Agencies, Boards and Commissions, which was appointed in 1985, to review, among other things, the operations of all agencies (580) of the Government of Ontario.

Clearly, there is no way that the existing Committee on Procedural Affairs can meaningfully review even the 91 administrative agencies. In recent years, the Committee has been able to see about five agencies a year, concentrating primarily on those that are operational. The operating agencies are naturally important, but they bring to the front the managerial problems of such an agency rather than the kinds of issues which should form the basis of review of administrative agencies which hold hearings.

The new Standing Committee should communicate and work with the Council, to develop criteria for reviewing these agencies. It is my opinion that the Committee should not call an agency before it to inquire about a particular decision that an agency issued. Rather, the Committee should be interested in issues such as backlog, turnaround time, what problems the agency is experiencing (i.e. financial, staffing). I believe that it would be very beneficial both to agencies and to the House, if the relationship of the agencies, why they exist, what they do, and how they do their work, were better understood by the House.

In addition to help the Committee establish criteria for review, I recommend that the Council assist the Committee in designating which agencies to review during the Session. Some of these agencies could be interviewed in groups. A great deal could be arranged ahead of time, including a schedule and a questionnaire that would be available for the Committee. At the end of each Session, the Committee could announce which agencies are to be ready for review at the next Session. This would give the agencies time to prepare a brief to the Committee which the members can study prior to the hearing.

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**Fourth**—I would also recommend that these reviews be coordinated with the work of the Provincial Auditor.

These justification reviews would be excellent experiences for the agencies themselves and would create an opportunity for the Members of the Legislature to become more familiar with the operations of the agencies. With a substantial Justification Document from each agency, and each Ministry for each agency, and from the Council if asked, Management Board could have a closer look at the usefulness of agencies in terms of the need to sunset.

The success of sunseting or any other justification program is to instil public confidence that its money is being well spent and that it is getting value for dollars taxed. Sunseting, in my respectful opinion, is currently not achieving the very desirable goal of self-justification.

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## 8.4 APPOINTMENTS AND TENURE

A great deal of material has been published with respect to the appointment and reappointment process for administrative agencies. Some of the material is objective but much is very subjective. Some of the material is reasonably responsible while some of it is impractical and unimplementable. In discussing appointments to Ontario agencies, I believe that it is important to keep in mind whether one is speaking of the procedure by which appointments are made or whether one is talking of the quality of the appointees themselves. There is a major difference between the two, which most critics seldom distinguish.

### SOME ISSUES

**First**, it is very important to know the nature of the agency about which one is speaking. If one is making appointments to an agency that requires highly skilled and highly experienced men and women, it is very different than if one is considering appointments to a body which deals with everyday matters, where a general knowledge of community affairs is what is most required. If one is making appointments to a body that deals extensively with the law as opposed to a body which deals with agricultural products, different requirements are needed. One must understand very precisely the requirements of each agency and realize that they differ from agency to agency. Not only do the requirements of agencies differ agency to agency, but the appointment procedure must differ between agencies as well.

**Second**, how and what kind of hearings an agency holds will determine the type of appointment to be made and the procedure to follow. Very few critics of the appointment process have sufficient knowledge of the relationships, much less the individual requirements of the 91 agencies to make any useful comment upon the appointment process.

**Third**, some agencies do need full-time members, but it is a waste of public funds and the investment of time to place part-time members on some agencies. This fundamental difference necessitates a difference in the appointment procedure.

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**Fourth,** there is a big difference between a job that pays \$14 an hour part-time, and \$114,000 a year full-time. This is the range of salaries for agency members and Chairs. Some candidates could not possibly afford to take a part-time job at a small salary, out of town, if it means leaving the family, job, security and a future. Others couldn't possibly take a full-time job at some of the salaries which are offered and with no security. Others could not take a full-time position, regardless of the circumstances.

**Fifth,** Government appointment policy requires a balance of race, creed, age, colour, sex, competence and willingness to serve. This kind of balance is not easy to achieve through some preconceived appointment procedure and practice shows that all procedures have inherent weaknesses.

**Sixth,** there is a neverending debate about the tenure of appointments. Appointments at present are made, ranging from "at pleasure" (which in theory means you can be removed at anytime for any reason), or "at pleasure" with the added informal commitment that the appointee can remain until 65, unless removed for cause. Then there are hundreds of appointments which range from six months to five years. The trend, however, is appointments of three years with the possibility of one renewal. Added to this complexity is the fact that the appointee has no assurance of reappointment or length of reappointment. Very few men and women in business can give up their security and move out of town to accept short periods of employment, or even for two three-year appointments. Tenure is a very significant reality which affects not only the appointment procedure but also the quality of the candidates who may consider an appointment.

**Seventh,** "responsible government" means that the government is responsible for the acts and decisions of the agencies of this Province. Accordingly, no government, in my opinion, can hand over to others the appointment of agency members. Government must select the people whom it will hold responsible for the decisions, for which the government will be held responsible by the electorate. Most of the proposals which I have studied propose that there be some procedure setup involving a Legislative Committee or some outside body to appoint agency members. All these proposals, in my view, are not implementable and will lead to a strangulation of the agency system.

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## 8.4.1 FINDING THE RIGHT PERSON FOR THE RIGHT POSITION

Finding the right person for the right agency at the right time is not as easy as it sounds. Most often the timing of need and availability do not mesh.

There is an impression that there is an army of men and women out there just waiting to be invited to join agencies. In the case of cultural agencies and a few others, this may be true, but it is not true for most “administrative” agencies. Capable people have to be sought out, tested and encouraged to take time out of their lives, for the public good, and at considerable sacrifice in many cases. From my own experience and observation, the Peterson government has attempted to accomplish this goal. None of this is to say that the appointment process ought not to be opened up further. I offer, however, two caveats. The appointment process is not as easy to implement as it is to criticize, and whatever the appointment decision, it must rest in the final analysis, with the Government.

“Fit” is the critical issue and there a great many “fits” to be made in the appointment process. There are also a great many people to be considered in making each appointment.

- (i) There is the person to be appointed. I should emphatically add, that no end of job descriptions will inform a candidate about what ought to be known before accepting the appointment. The candidate must be interviewed in some depth by the Chairperson of the agency. Only through these interviews can the candidate learn first hand enough about the potential position in order to make an informed decision.
- (ii) There are the Chairpersons and members of the agency with whom the appointee will be working closely for years ahead. This involves a very important accommodation which can not be assessed by others. The Chairperson will not make the selection but his opinion on an appointment and particularly a reappointment is a proper consideration.

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- (iii) There is the Minister and the Ministry to which the agency and the appointee will be accountable. This relationship is one which has to be assessed by the Ministry alone.
  - (iv) There is the segment of the community, economy or specialty for which the agency has responsibility. There can build substantial pressure both for and against an appointment or a reappointment, which may have a considerable influence upon the ultimate decision.
  - (v) There is the Cabinet to consider, which properly has views about what kinds of people it wants speaking on its behalf.
  - (vi) There are the members of the Legislature. After all, the agency is a representative of the Legislature and every member of it. Many members, quite properly, take an active interest in the appointments made to agencies. There is the natural concern about local representation and the need to reward local public service.
  - (vii) There is public opinion to weigh and also that of the media.

The appointment process in all governments has caused discussion. In my view, the public expects that politicians will make political decisions. For better or worse, it means that politicians will tend to appoint men and women with whom they have worked and who are known to them. In the process, most politicians believe that they also seek out the most qualified people for the positions available, and on the whole I believe that this has been true in this Province. As I observe the civil and public service of this Province, I believe that it is well served.

What is missing, however, is a feeling that if positions and appointments were to become better known, the Government could be better satisfied that the most able and willing candidates have been considered in the appointment process. I do not profess that the agency system is perfect, but if it has any major imperfections, they can be put down more to the lack of coordination of agency performance and the lack of training of agency members, than to the failure of the appointment process.

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## 8.4.2 THE APPOINTMENT PROCEDURE

The appointment process is somewhat a matter of perception. If the public saw more of how the process operates, and could feel confident that the best people were being considered, I believe that there would be a great deal more confidence in the administration of government policy and statutes through the agencies.

At the present time, appointments in theory, are made upon the recommendation of the Cabinet Minister responsible for an agency, to the Premier, who then makes his recommendation to His Honour the Lieutenant Governor. The Lieutenant Governor in turn makes the appointment by an OIC.

The most reliable appointment procedures should concentrate, not on who wants to be appointed, but rather the needs of the agencies in their search to serve better the public interest. Within the Premier's Office, there is a fair balance between the realism of politics and the duty to respect the public interest. To my mind, it is untrue to suggest that a potential candidate cannot be a good appointee because he supports a party. Every man and women who can, ought to take some part in the community and political life of this Province. The most effective way of doing that is through one of the recognized parties.

I believe that the best appointment procedure in the world will not guarantee good appointments, just as poor procedure will not guarantee poor appointments. The best appointment procedure will not turn up many of the real personality difficulties which can occur. So many things can go wrong between the time of the interview for a position and the performance of an agency member. An appointee may look fine on the surface from all the enquiries that are made, but sometimes turns out to be quite a different person than one thought one was engaging. Many issues can crop up. The appointee's health can deteriorate. More work can be asked of an appointee than expected, or the new member may not get on well with the members of the agency or Chair. The new member may turn out to be lazy, not possess good judgement, not handle public hearings well, be argumentative or impatient.

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I would like to observe that from time to time one hears reference to the word “patronage” as if it was a dirty word. The word “patronage” appears to have assumed a meaning not ascribed to it in either legal or other dictionaries. The word “patronage” seems in its common usage to have several dimensions; (1) something unseemly; (2) something improper; (3) something that never should happen on the merits.

The basic changes to the appointment process, which I would recommend to the Government, involve opening up the system and inviting appropriate input. But I believe that it would be a serious mistake to turn the appointment process over to others. The Chairs and the Ministries have the best assessment of what the real requirements of the agency are at the time, subject to the overview of the Government as a whole.

The complicated proposals of the Canadian Bar Association or even of the Committee of the Legislature, not to mention the dozens of other papers which have been written on the subject of appointments, are not easily or effectively implementable. They do, nevertheless possess an important direction which could be favourably considered.

## **RECOMMENDATIONS TO OPEN UP THE PROCESS**

To open up the appointment process, I would recommend the following:

**First, a Council should be created in Ontario with the public duty to search out potential appointees through advertising or other appropriate means, and if thought desirable, to interview and assess candidates along with representatives of the involved Ministry and agency.** This could create an open inventory of available and interested candidates for the Ministry, the agency and the Premier’s Office to consider.

I must, however, point out that this function could be carried out by an Appointment Secretariat. This would have lower profile, but would not appear to the public to be as open nor would it possess the kind of expertise of the Council.



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As attractive as advertising may seem on the surface, it has immense draw-backs not apparent on the surface. I believe, however, that the gateway to an open process is some advertising and some invitations to serve. What will be important in an open appointment process is that residents who want to make known their willingness to serve have confidence that their names and willingness to serve will be brought, with their qualifications, to the attention of those making the appointments.

The appointment procedure should generate a list of well-qualified, skilled candidates from which future appointments may be drawn.

I believe that it ought to be possible to assign members from one agency to another to take care of an overload of work or in a case where there is a need for experienced members to be appointed to an agency. The Government ought to consider career appointments for some agencies where experience and special skill are essential and where the public is not as well served without them.

**Second, I believe that before a member is appointed or reappointed that the Chair of the agency concerned should be consulted as to the suitability of the candidate.** The needs of an agency can change. It may be very important to add another lawyer, or to add an economist or an actuary or a person with medical competence etc. The needs change with time and with each appointment. I do not believe that the Chair should make the selection, but I do think that there should be consultation with the Chair. This consultation is important with appointments, because after all, the Chair has to manage the agency and create standards of performance that are satisfactory. Consultation is absolutely essential when dealing with the question of reappointing a member of an agency. Perhaps only those of us who have been a Chairperson can understand that over a three year period of association, it becomes apparent to the Chair and often to other members as well, that a member should not be renewed for a number of reasons. We are often loathe to make an issue of it during term of the member, but there is no question that some members ought not to be renewed. The Chair at the time should make that clear to those making the appointments, but this is not possible if the Chair is not consulted.

A number of senior ministry persons indicated to me that they saw no need to consult a chairperson when recommending a reappointment. What some people outside agencies do not

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seem to understand, is that pulling together, is often the only antidote to falling apart. After three years of service, the Chair is in a good position to warn of laziness, incompatibility, inability to chair a public meeting, unwillingness to learn new ways and techniques, an inability to make decisions or to commit them to paper, bad staff relations etc.

The quality of the staff is often in direct relationship to the quality of leadership of an agency. I believe that a Chair should be held responsible for the quality of the agency's performance and the tone and quality of the staff.

**Third, particular openings should not be under or over sold to the appointee.** Some candidates need to know whether the job will in fact take three days a month or thirteen days. The best way the candidate can understand the position under consideration is to be interviewed by the Chair of the agency. As a matter of practice, I believe that a Chair ought to keep the needs of the agency known to the Ministry, and through the Ministry, the Premier's Office.

**Fourth, it should be made clear to the new appointee that although appointed by the Premier's Office, the Chair is responsible for the performance of the appointee and it is to the Chair the Government looks for recommendations dealing with the various members.**

**Fifth, any person who has accepted an appointment to an agency should be told three months before the appointment comes to an end whether that member is going to be reappointed or not, particularly if the member has been a full-time member and will need to find other employment if not reappointed.** It is absolute nonsense to say that if notified three months ahead of time that a member will slacken off and not work. Failure to give notice is not only unhumanitarian, but it is also evidence of an incompetent process.

**Sixth, I do not support or recommend the possibility of only one reappointment. A competent person should be eligible for more than one reappointment.** Reappointments should be looked at as an opportunity to save time and money on the public investment in the training of the appointee to act proficiently in the public interest.

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I believe that there should be a recognizable pattern for the tenure of appointments to agencies in Ontario. We have in Ontario all kinds of tenure entered into under all kinds of circumstances. I recommend that the Council be directed to develop categories of agencies as to salaries, appointments, tenure and reappointments, for the Government to consider. In this way appointments of full-time, as opposed to part-time members, can be justified on something more than the flip of a coin. Then tenure can be based on the reality of the long term need of the agency.

The level of salaries is a matter of Government policy, but some of the salaries are not only way out of line with even the lower quartile of industry salaries, but the salaries within the agency structure are totally unrelated. The present salary structure is in total disregard of the Directives of Management Board, and is absolutely indefensible. Salaries and tenure in the agency structure are a classic proof of the old axiom about the “squeaking wheel”.

**Seventh, agencies should be designed so that there can be a rollover of members.**

The objective is a good agency structure that can be justified and which serves the public well. Frankly, I do not think that there are, as far as the public is concerned, agencies that are less important than other agencies. They are all important but by categorizing agencies, a proper structure for appointments, salaries and tenure can result.

I would observe that the power to appoint implies the power to remove. (Section 27(1) *Interpretation Act*). I would like to make mention of four cases that deal with discharging people who serve at pleasure.

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(i) *Nova Scotia Government Employees et al and A.G. Nova Scotia [1981] 1 S.C.R. 211.*

This is an instructive decision (three dissents out of seven) wherein the court discusses the common law relative to the power to dismiss persons serving “at pleasure”, and contractual or legal claims which may flow in any event.

(ii) *Clarke v AG Ontario [1966] 1 O.R. 539.*

(iii) *Malone v The Queen (Ontario)(1983) 45 OR (2d) 206*

(iv) *Weatherhead v The Queen (Ontario) 1984 49 OR (2d) 248.*

There is also an interesting article on the obligations of a government which discharges an agency member who is serving at pleasure by H.L. Molot in 1989 *Canadian Journal of Administrative Law and Practice*, Vol 2, No 2.

I should point out before leaving this matter of appointments that the Directive 6-1-1, dated May 86, of Management Board, reads as follows, “Government appointments are made at the pleasure of the responsible minister and/or the Lieutenant-Governor.” I believe that it is likely that, even if members are appointed for a fixed term by an OIC they can be removed at will. However, the authority to remove at will may not relieve the government of an action in contract. *The Interpretation Act* makes it clear that those now serving “at pleasure” can be removed without cause or notice and, as a result, they may be in a less advantageous position as to damages than those appointed for a fixed term, if the fixed term can be said to imply a contract.

**Eighth, I strongly recommend against trial appointments.** There have been recommendations that the first year of the appointment ought to be a trial period during which the member is on probation. Such trial periods can have a negative impact on the independence of judgment of an appointee. Having a person on probation during the first year can cause serious staff and credibility difficulties and it is no more difficult to turn a member down at the end of a the trial period than it is to remove the member who has not worked out.

**Ninth, I believe that when an appointment is made that there should automatically be**



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**a press announcement both to the Press Gallery and a Notice filed in the Ontario Gazette announcing the appointment and the its terms.** The announcement should contain a brief statement of the task to be performed and the qualifications of the appointee. This would go a long way, in my opinion, to opening up the appointment process. The appointment may be “a matter of course” to a government, but it is a matter of great importance to the agency system itself and those affected by it.

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## 8.5 REMUNERATION

Having discussed appointments and tenure from the point of view of the process, I will turn now to the remuneration of agency members. There are a few facts which ought to be borne in mind in discussing remuneration.

There are about 850 part-time and 350 full-time members of the 91 agencies, making a total of approximately 1200.

Of the 1200 members, approximately 91 are chairs and 125 are vice-chairs (there is even a President which I think is unauthorized).

It is always dangerous to generalize, but in general, part-time agency members are paid on a daily basis while full-time members are paid on an annual basis. Vice-Chairs are paid, whether on a part-time or a full-time basis, at a somewhat greater level than an ordinary member but less than the Chair. The information that I have gathered tells me that the lowest per diem rate for a part-time member is about \$14 per hour but a few part-time members are paid \$500 per day. Some labour arbitrators are pushing for payment of up to \$2000 per day and told me without so much as a smile that they thought that they were worth it. The rate of pay for full-time members, Chairs included, ranges from \$38,600 a year with no pension provision to over \$100,000 a year with a pension (a civil servant who is a chairperson).

Before commenting upon the Management Board Directive 6-1-1 dealing with salaries and benefits, it is worthwhile asking some questions.

- Should the salaries of part-time and the salaries of full-time members be calculated on any different basis per hour? Put another way should an hour of a part-time member be any less or any more valuable than an hour of a full-time member?
- Should agencies be classified on the basis of responsibility and expertise, so that there are different classifications of tenure, reappointments and salaries?
- What bench-mark should be used in assessing whether a member is being fairly paid or not?
- Should each agency remunerate its members at the same rate as all other agencies, or should they all have a different rate, or can some agencies be grouped?

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- Is it possible to have differences in pay and tenure based on distinctions between the qualities which a member brings to the agency or based upon the performance of the member once appointed, particularly upon renewal.
  - Is there an intolerable difference between the salary of one member of an agency and another? I observed some salary differences of over 100% within the same agency. (This is intolerable).
  - When a member of the civil service is appointed as a member of an agency, should that person have to resign from the civil service, or does it matter that the civil servant will serve beside someone who is receiving half the salary and no pension for doing the same or better work?
  - Should it be possible for a member of an agency to make contributions to some kind of a retirement or pension plan which are matched by the Province in order to make retirement provisions for agency members possible?
  - Should the salaries of members of agencies be tied in some way to salaries of others in the employ of the government?

Management Board on May 1986 by Directive 6-1-1 announced that it was issuing a Directive relating to Government Appointees in order:

“To provide criteria for the equitable and consistent treatment and remuneration of all appointees who are directly accountable to a minister of the Government of Ontario.”

The information I have tells me that the treatment is neither consistent or understandable. There is in my view not the slightest doubt that the Directive is applicable to agency members. One can readily make some salary and tenure comparisons which are very difficult to justify.

The Directive of Management Board continues by stating, “...all appointees to that agency must be recompensed in a consistent manner.”

One can clearly see after some analysis that this aspect of the Directive is not being observed or enforced.

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The Directive, which after all is Government policy, goes on to provide:

“An element of public service is implied in any appointment by the Government of Ontario and, therefore, any remuneration that may be paid is not expected to be competitive with the marketplace.”

In this respect, the Directive is being complied with!

The Directive continues by providing:

“The term of appointment must not exceed three years, with a reappointment allowable up to a further three years.”

I have already commented upon the three year limit of an appointment and the reappointment for a further three years. This part of the Directive isn't being honoured either.

I suspect that this disregard by the Government of its own Directives does little to build confidence in the agency system, of which the Canadian Bar Association and others including the Canadian Law Reform Commission, have written so forcefully.

The remuneration of an appointee must be specifically set forth in an order-in-council.

There was a change made in February 1989 concerning time spent on travel and preparation. Now travel and preparation time guidelines are set by the Ministries. With great respect, this simply perpetuates the many and unnecessary differences there are in the treatment of members, whether at the time of appointment, the time of reappointment, or in salaries or other benefits.

Seemingly the above applies only to part-time members, because the time spent in travelling, etc is included in the yearly salary. With great respect, preparation time of one day for a hearing can be totally inadequate. As to travel time, I find it hard to believe that the Government can encourage broad geographic representation from the North and North East, by requiring those people to travel at 60% of the daily rate, while local people, by



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virtue of their proximity, travel at the taxpayers expense. It is one thing to declare that public service is a reward of its own, but surely its another thing to ask people who have to fly from the Lakehead to do so partly on their own time.

**I believe that the salary rates, conditions of payment, and other benefits ought to be reviewed. I would propose that this review could be carried out by the Council, which could make recommendations of value.**

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## 8.6 TRAINING

It is my opinion, confirmed by dozens of interviews with Chairs and agency members, that a corner-stone of a well operating agency structure is the training of new and incumbent members. This Section of Chapter 8 discusses the nature of that training, its contents and by whom it should be conducted.

While it may seem evident that all new appointees to government agencies should have some form of introduction to government and the agency to which they have been appointed, such does not generally happen. Although most individuals with whom I consulted, agreed that orientation and training courses are essential, it was conceded that it is most critical for appointees who will sit as adjudicators.

Approximately, 95% of all appointees to agencies come from outside the public service. Individuals serving on such agencies are rarely drawn from the civil service. What this means, is that 95% of appointees to these agencies have little or no knowledge of the way the government operates. What is perhaps even more concerning, is that the majority of the appointees are expected to fulfil an important function as adjudicators, yet they have had no experience or training in how to go about their appointment. (I am sure that it is not necessary for me to observe that it is not in the interests of this Province to recruit only those with experience in government).

What is necessary then is to provide training for new appointees on two levels. One, would be a general introduction to the government processes, the central agencies, the ministries, the approval processes, human resources management, pay, benefits, etc.

Second, some mechanism for on-going training should be established. In essence, courses should be provided to members of these agencies on a continuous basis, during the term of their appointment. As one Chair pointed out, learning to write a good decision has to be taught slowly. These are arts and they take time to perfect.

Decision writing is only one course that should be offered on a continuous basis. Others include, rules of evidence, bias, statutory interpretation, as well as emerging issues in government and law. It is important that there be a review of the constantly changing

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case law. As well, courses should be taught in conciliation, mediation, arbitration and the newest forms of dispute resolution. It seems evident that keeping members of agencies up to date on current issues in the law, and the administration of government will prove invaluable, not only to the individual, but to the operation of the agencies.

### 8.6.1 CORE COURSES

There are a number of core courses that are common to all agencies that should be taught to all new appointees. These courses include:

- (i) General orientation to government (who are the key players)
- (ii) Administration (benefits, internal staff, administration)
- (iii) Communication - learning how to listen
- (iv) Rule of law, natural justice
- (v) Administrative law
- (vi) Charter of Rights issues
- (vii) Statutory interpretation
- (viii) Role of the adjudicator (conduct, relations with staff)
- (ix) Preparing for a hearing (how to analyze a file)
- (x) Pre-hearing conferences
- (xi) Settlements
- (xii) Practice and procedures in hearings (*SPPA*)
- (xiii) Mock hearings
- (xiv) Observing other agencies
- (xv) Rules of evidence
- (xvi) Post hearing procedures
- (xvii) Synthesizing information
- (xviii) Writing decisions and the reasons for decision

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- (xix) Judicial review
  - (xx) Stating a case
  - (xxi) Appeals, Rehearing, Petitions
  - (xxii) Media relations
  - (xxiii) “Pitfalls” - Problems beginners can get into
  - (xxiv) Policy making
  - (xxv) Fettering
  - (xxvi) Funding, costs
  - (xxvii) Role of the Ombudsman
  - (xxviii) *Freedom of Information and Protection of Privacy Act*
  - (xxix) *French Language Services Act.*

What appears evident is that for many practical reasons neither Management Board or the ministries have the time or the expertise necessary to conduct such orientations. Recognizing that it is vital to have training in this very broad area, and that it be formally organized, as there are a large number of appointees every year, the question becomes, what is the appropriate structure for such a program?

The Council to which I refer, appears to be the most appropriate structure to undertake this extensive but essential training task. The consensus amongst the individuals interviewed is that there is a tremendous necessity for such an undertaking. The questions then arise as to who would facilitate the sessions, where would they be held, and what resources would be required. What is important to note is that there are a great many academics, judges, lawyers and bureaucrats, who have expressed their interest in participating in such an undertaking on a voluntary basis.

There is agreement amongst those who have either held training sessions or participated that the approximate length should be two consecutive weeks for the mandatory course content. The two week training would be followed up with subsequent courses intermittently. This format seems to provide the individuals with



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the much needed time to become comfortable and familiar with the training. As one Chairman pointed out, learning the legislation is a very dry process for most individuals, yet it is a critical aspect of the position.

The advantage of being able to learn the theoretical aspects of the legislation, followed by some practical experience, enables the recipient of the training, not only to become familiar with the details of the legislation, but to understand as well, how to use the legislation in a controlled environment. It may amaze people who are inexperienced in these matters, that one of the major challenges for new members is to understand that they must operate within a statute, rather than dispensing decisions as if they came from “on high.”

When it comes to the question of who would facilitate the courses, while volunteers from various fields have already come forth, unquestionably the best people for the job are those individuals who have gone through the process themselves. While the members of the Council would have the task to ensure administratively that the courses are provided, they would also clearly be very good choices for facilitating some of the sessions as well. Furthermore, chairmen of other agencies, vice-chairmen and members should be asked to facilitate some of the sessions. Basically, these individuals will not only be accepted but respected as well.

It is important to address the problem of varying levels of knowledge and expertise which the appointees bring with them. What is important to note however is that, it is clearly impossible to eliminate the differences altogether. An effort should be made to make the sessions as relevant for the individual as possible with a conscious attempt to tailor the courses to the level of knowledge of the participants.

## **8.6.2 COURSE CONTENT**

### **GENERAL GOVERNMENT**

Given the situation, it seems only reasonable to suggest that all new appointees should be provided with a general orientation to the workings of government. In particular, all new

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appointees should be briefed on the structure of government. As noted, many interviewees did not know anything about the central agencies of the government, or for that matter the structure of the ministry to which they account. It seems fundamental that Chairs and agency members should have some knowledge of what Management Board is, what the approval processes are, as well as what the organizational structure of their respective ministry.

Furthermore, it was surprising to find that while most of the agencies' budgets are approved as part of a ministry's, very often the Chairs have no input into even the budget of their own agency. Clearly, while the Chairs do not control the agency budget, they should at least be consulted about what is needed and the cost involved.

Consultation is the exception and not the rule. In fact there are Chairs who don't have an idea of the cost of operation of their agency. Little wonder then that they would not be able to contribute constructively to get value for taxes spent by the agency.

Government policies and priorities applying to the agencies' fiscal and other constraints, and its expectations of the agencies, should be addressed with new appointees and reconfirmed with existing members while in training.

While the budgeting process is a very important facet of the operations of an agency, an even more fundamental aspect is the accountability and ongoing relationship which the agencies have with the Ministry and the Government. It is critical that the mandate, issues and problems of the organization and its relationship with its Ministry and Central Agencies, be understood by all new appointees. While agencies receive delegated authority from Ministers, as do government ministries, the extent and the nature of the delegation is different in each case, as I discuss elsewhere in this report.

The point to be noted here, is that most often the interviewees had only a vague understanding of the concept of accountability. In fact, only five per cent of the interviewees could respond with any sort of certainty to questions with regards to Memoranda of Understanding.

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Given the fact then, that there is no real administrative mechanism to facilitate and ensure that an accountability framework exists, it is critical that a session be spent with all new appointees dealing with this most fundamental principle of accountability.

While the subject of appointments and reappointments receives much publicity and attention, very few interviewees had a clear picture as to what the actual process is, and what it involves. The only way to instill some confidence into the system it seems is to begin by educating those who are a part of it. This is a very important area pertaining to administrative agencies.

There are a number of policies specifically pertaining to appointees, which should be discussed with the appointees. For example, Management Board Directive 6 deals with Conflict of Interest. All new appointees should be aware of what that involves before they take up their appointment.

The legislative committee process is another important area of the government structure with which new appointees to agencies should be familiar. In particular, all new appointees to agencies should be aware of the role and functions of the Standing Committee on Agencies. This Committee of the Legislature was set up specifically to deal with agency matters. This Committee has been empowered to review and report to the House its observations, opinions and recommendations on the operation of all agencies. In essence, the appointees should be knowledgeable about the various structures that are in place that may affect their agency.

All appointees should also be familiar with the Public Accounts Committee. The Provincial Auditor examines the accounts of the Province and the agencies, and makes annual reports to the Legislature. Subsequently, a ministry or an agency may be called before the Public Accounts Committee to respond to questions dealing with its operations. Often, the parties that are called to appear before the Committee, are those with which the Auditor has indicated a problem area.

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## THE OMBUDSMAN

The Standing Committee on the Ombudsman is another legislative committee that all appointees should know about. The potential impact of this Committee on all agencies is discussed at length in another section of this Report, as is the Office of the Ombudsman. What is important to note, at this point, is that all appointees should be knowledgeable of the existence of these Committees, and others, and their relationship to the agencies.

## THE INFORMATION AND PRIVACY COMMISSIONER/ONTARIO

The Information and Privacy Commissioner/Ontario, is another key player within the government structure. All appointees should be knowledgeable of the purpose, intent and philosophy of the *Freedom of Information and Protection of Privacy Act* (FIPPA). They should furthermore, familiarize themselves with the scope and organization of that Act and its application. It is important that members of agencies be aware of the access process, and the potential impact of that process on each agency.

## ADMINISTRATION

Many new appointees, I found, had no understanding of the administrative processes of government. Many were not even familiar with the process of how they get paid. On two occasions in fact, new appointees had not received their first pay until 6 months after joining their respective agency. Not only is it important to provide newcomers with an understanding of the pay process, but they should also be made aware of any benefits to which they may be entitled.

## COMMUNICATION

During the course of interviews I found that, one of the most essential criteria, as identified by chairmen, in the training of members, is to be a patient listener. One session would focus on learning how to listen and assess.



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## **ADMINISTRATIVE LAW**

All new appointees should have some understanding of the historical background of how administrative law evolved in order to appreciate and understand the area of work that their appointment involves. This session would introduce the new appointees to the growth of Canada's and Ontario's agencies, as well as the functions of agencies.

## **THE CHARTER OF RIGHTS**

The subject of "The Charter and the Tribunals" is receiving increasing attention. Essentially, the judicial trend has been to give administrative agencies some scope to consider Charter issues. It seems critical that agency members be provided with some background on this emerging subject, and its implications as they relate to administrative agencies. The point to note is that the "Charter" will affect individual agencies differently, and therefore it is important that new appointees be made aware of the potential effects on the different agencies.

## **STATUTORY INTERPRETATION**

While one clearly recognizes the importance of agency members understanding their particular statutes, it is also important for them to be familiar with those of other agencies. Thus, one session would concentrate on familiarizing new appointees with various pieces of legislation in order to gain an appreciation and greater knowledge of statutory interpretation.

The subject of statutory interpretation is one of the two most difficult areas for new members. Training in the application of various statutes would be of tremendous help in decision-making. A number of problems that members encounter include the ambiguity in the meaning of the words; overvagueness and overprecision, as well as overgenerality and undergenerality.

In many instances, an Act is capable of more than one meaning. While this may be the result of poor drafting, it may also be the result of compromise that took place during the course of debate. Also, an Act might use different words to describe the same thing. There are other aspects with regard to statutory interpretation, however, the point to be noted at this time is that Chairs and members have indicated that it is a very difficult area of the job

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and they would welcome any training that could be provided to them in this very important area. During this session, it would be helpful to the appointees if the intricate process of legislative drafting and passage of the bill was explained. There should be some discussion of the interpretive tools which are available to interpret and apply to legislation. It should be noted as well, that the Council should also assist the agencies to set up their own internal training, in order that the members learn within their own structure.

## **PREPARING FOR A HEARING**

All new appointees should be taught how to analyze a file prior to a hearing. At times the members may not be familiar with either the legal or the technical aspects of the case coming before them and may wish to discuss and be briefed on such issues by the agency's staff in preparation for the hearing. A number of Chairmen stated that the subject of the use of agency staff and counsel should be discussed with new appointees. Staff status, the relationship of the appointees with the staff members of the agency, as well as staff involvement at hearings should be reviewed.

## **PRACTICE AND PROCEDURES IN HEARINGS**

All new appointees who will be participating in hearings should be familiar with the proper procedures for holding a hearing. First, all new appointees to such agencies should be familiar with the *Statutory Powers Procedures Act*. It is fundamental to the process that all appointees should understand what constitutes a "fair hearing". This means that it is necessary to hold a session or a number of sessions, on the topic of "the hearing". All members to these agencies must be familiar with notice, what it means to have a meaningful opportunity to take part, disclosure, testing the evidence, adjournments, and also the "he who hears" dicta. In addition, there should be discussion of interventions, interrogatories and answers, as well as pre-filed evidence.

Other subjects which should be discussed include:

- the hearing setting (location and atmosphere, obtaining accommodation)
- pre-hearing conferences (what they are, what form they take)

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- subpoenas
  - production of documents
  - background briefing material
  - reporters
  - opening the hearing
  - representations at the hearing (introduction of the parties, use of panels of witnesses, swearing of witnesses)
  - use of exhibits (circulation of, numbering)
  - contempt and other enforcement powers.

During this portion of the training it would be useful to take the group to observe hearings of other agencies.

## **ROLE OF THE ADJUDICATOR**

During the interviews, many chairmen stressed that it is crucial that members be given some instruction on their role as an adjudicator. Most Chairmen have at one time or another had some major difficulties with agency members who are unfamiliar with how to behave or conduct themselves during a public hearing. It is important that all members be aware of the fact that they should be courteous to the parties appearing before them. While this may seem obvious, apparently some members are not aware of it. During this portion of the training, other issues such as the panel's composition, the selection of the chairman of a panel, as well as the role of the panel should be discussed.

## **RULES OF EVIDENCE**

Learning about and how to handle the rules of evidence is a matter of importance to all appointees to agencies which hold hearings. It is essential that some instruction be given with respect to the rules of evidence. This session would involve a discussion about discretion and the admissibility of evidence, what is opinion evidence, what counsel needs to know, as well as the various methods of qualifying an expert witness.

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Another issue that should be addressed is the use of outside consultants and outside evidence. For instance, factors which determine the need for assistance include the: a) legislation, b) background of the agency members and the staff, c) agency experience and confidence level, d) nature of the matter before the agency, e) parties' participation level before the agency, as well as other factors.

## **POST HEARING PROCEDURES**

What happens when the hearing has been concluded and members find that they are missing critical information. While this is only one potential situation, it is important to note that very practical situations should be discussed with newcomers. Other post hearing procedures include, synthesizing information, writing decisions, giving reasons with decisions, and other such critical steps about which new members should be informed.

## **WRITING DECISIONS**

It is recognized that maintaining uniform standards and consistency in agency decisions is a goal to which all agencies should strive. It is also necessary that a standard of quality of writing and reasoning be evident in agency decisions. Thus, it is important that instruction be given in the area of writing decisions. Pointers should be given in the grammar and style in the writing of reasons for a decision, as well as the structure of a decision (ie. what should it look like, what are its components).

## **MOCK HEARINGS**

All chairs, who have held at least one training session for new appointees, stated that the mock hearings were a tremendous success. The success rate was particularly high in those instances where the mock hearing was taped and then played back to the participants. The response from agency members who have been involved in this type of session is that it is extremely helpful.



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## **REHEARINGS, PETITIONS, APPEALS AND REVIEWS**

This is yet another area in which an agency may have experience. It is important that members be aware of potential situations where there is an express power to rehear or review. For instance, does to rehear mean before as well as after a decision? What do the words rescind, change, alter, and vary really mean? Are they the same thing, or are they different? If so, in what way do they differ?

## **JUDICIAL REVIEW**

What is it? Many new agency members do not know what judicial review means. What are the implications of a judicial review? During this portion of the training session, it might be beneficial to invite one of the Divisional Court judges to speak with the group. What are prerogative powers? What are prerogative remedies? These and other issues relating to judicial review should be discussed with all appointees to regulatory agencies. Where do the courts get their authority to review, and is review the same thing as an appeal?

## **STATING A CASE**

What is a stated case? Is it a statutory right? When should an agency state a case? How are the challenges to an agency stating a case handled?

## **MEDIA RELATIONS**

Various agencies deal with issues that are under the public scrutiny due to the nature of government priorities, environmental, fiscal and other pressures. It is important then to ensure that new appointees be given some introduction to media relations.

In particular one can appreciate the importance of this segment of the training, if one takes as an example an agency with fifty or more members, who sit all across the province, dealing in many instances with very controversial issues. It is unlikely that a chairman of an agency with many members can always be the spokesperson. The potential danger of a “loose cannon” can be limited if appointees have some background in media relations.

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## “PITFALLS”

As a practical approach to the whole subject of new appointees to adjudicative agencies, one session should be spent on potential problems that a beginner can encounter. For instance, what happens when a party does not show up for a hearing? In some other instances, how can the agency deal with an unruly crowd, or in a situation where guns and knives are in evidence? How does a member deal with contempt, or, what if a legal problem is posed or one of jurisdiction?

While it may appear that all the courses discussed above really apply only to new appointees as adjudicators, with either little or no background of the way government functions, the training should not be restricted to those individuals. In fact, all agency members interviewed showed great enthusiasm for such training, and expressed the view that such sessions should be open to all members, old or new. Many interviewees took this view even further and suggested that such an orientation and training would enable members to a) participate in more than one agency, in terms of being appointed to other agencies; and b) to assist other agencies to clear backlog, by going on loan to other agencies. In essence, the skills and information would give them the flexibility and the ability to perform on a number of agencies.

Furthermore, many government administrators with whom I spoke, stated that it would be beneficial to the whole system if they, as government employees with who have responsibilities with regard to agencies, could participate in such an orientation. The view is that they would develop a greater understanding of the process, just as would appointees to agencies.

While all the courses discussed may not be of direct use to all those who participate, there is agreement that all would benefit from the knowledge obtained. Clearly, if we expect these people to perform their duties with excellence in serving the public, we must provide them with the necessary tools that will enable them to so.

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## 8.7 A CODE OF CONDUCT FOR AGENCY MEMBERS

Very few agencies have Conflict of Interest Rules, but I would commend them to all agencies and particularly the major agencies. Management Board has issued “Directives” which establish administrative policies for the agencies and Ministries of the Ontario Government. The Directives govern anyone appointed by the Government to undertake any function on behalf of the Government, including Schedule 1 agencies, unless exempted by a Memorandum of Understanding. The Directive uses the phrase:

“A government appointee shall not use information obtained as a result of his or her appointment for personal benefit.”

The above represents however only one side of the coin, namely what the appointee may not do with information gathered as a result of the appointment. The other side of the coin involves the disclosure of information or the avoidance of an appearance of bias in the making of decisions by a tribunal member.

The Directive makes it clear that the tribunal member must declare, at the earliest opportunity any perceived conflict to the chairperson, who must then record the same in the minutes of the agency (and not all agencies keep minutes) and thereafter advise the Ministry responsible for the agency, of the nature of the conflict.

Management Board has issued Guidelines to assist appointees with the implementation of the Conflict Directives.

Conflict of interest relates to a direct pecuniary interest of the appointee personally, or through his immediate family. (This includes spouse, parents or children.) A direct personal interest is to be interpreted as an individual interest rather than one which is shared as a class of persons. It is not considered a conflict if a large segment of the population will benefit from the decision as well as the appointee, but I believe that it is best to declare the interest and let someone else deem that it is not a conflict. Conversely it is clear that there is a conflict if the appointee could benefit while a large group of people could not benefit.

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Once there is any question of a conflict, the appointee having disclosed the conflict or possibility of conflict to the chairperson, should refrain from further participation in the matter under consideration or soon to come under consideration. Failure to disclose a conflict is cause for termination of the appointment. In any event, it is unwise to risk exposing the agency or the government to an attack, when it is likely that only the member's judgment could have protected them.

Personal gain of the appointee or loss financially to the agency may lead to a demand for restitution of the funds and the individual may be disqualified from further government appointments.

*The Public Service Act* (R.S.O. 1980, c.418) sets out certain criteria regarding the political activity of an appointee. The Ontario Manual of Administration has set out guidelines for public servants under headings such as "Political Activity", "Conflict of Interest " and "Radio and TV Appearances ".

In 1988, there was passed an act titled *Members' Conflict of Interest Act*, (1988 S.O.C.17) which sets forth standards that govern the conduct of Members of the Legislature and which should be read by all agency members to obtain the sense underlying the Legislature's policy direction in relation to conflict and conduct.

Several years ago a study was conducted for the Federal Government titled "Ethical conduct in the public sector" which is instructive. From an extensive review of the material on conflict in the public sector, it is clear that there are three basic criteria for conflict of interest rules:

- **Are the Rules simple?**
- **Are the Rules fair?**
- **Are the Rules reasonable?**

The following are ten principles of conduct which in my view should apply when an agency is creating its own specific rules of conduct.



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- (1) Agency members shall not have any direct personal interest other than those permitted pursuant to these principles, which would be affected particularly or significantly by Agency actions in which they participate.
  - (2) Agency members must not solicit or accept transfers of economic value from private sources, other than small gifts or personal benefits received as an incidence of the protocol or social obligations that normally accompany the responsibilities of office, unless the transfer is pursuant to an enforceable contract or property right of the appointee. My recommendation is that no appointee should accept any gift from any person who could be the subject of any decision of the agency, whether involving the appointee or not. Many years ago, a Government of Ontario was nearly defeated because the then Premier accepted a “coal scuttle” from a grateful citizen (value about \$50). I can remember a Cabinet Minister substantially tarnishing his reputation because he accepted a very expensive ash tray from a businessman with whom the Ministry did business. My advice would be to accept nothing. Buy it yourself if you want it. A free meal enjoyed in public is likely about as far as one ought to go. If this seems restrictive at least it has this going for it, you will never have to explain anything about it, to anyone.

Section 6 of the *Members' Conflict of Interest Act 1988* requires disclosure where the benefit exceeds \$200 or where a series of benefits in a year exceed \$200. Appointees should be aware that Section 110 of the Criminal Code creates an offence for an official or an employee of the Government to demand or accept benefits for himself or his family from people having dealings with the Government.

- (3) No appointee shall, without the approval of the Chairperson or the Deputy Minister step out of his official role to assist private entities or persons in their dealings with the Government where this would result in preferential treatment to any person. This would not preclude simple referrals or references.
  - (4) Agency members shall not act, after they leave the agency, in such a manner as to take improper advantage of their previous office.
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- (5) Agency members shall not knowingly take advantage of, or benefit from, information that is obtained in the course of their official duties and responsibilities and which is not generally available to the public. Common sense must apply here because very often a member of an agency, upon leaving the agency may return to act as a consultant or to practice a profession whose role is patently resourced, at least in part, by the experience gained as a member of the agency. Once members leave an agency, I do not believe that they should ever appear or practice before it in any capacity.
  - (6) Agency members shall not directly or indirectly use, or allow the use of, government property, including property leased to the government, for anything other than officially approved activities.
  - (7) Agency members shall not engage in partisan political activities which will jeopardize the political neutrality and impartiality, both real and perceived, of the agency. One should note that sections 11 to 16 of the *Public Service Act* are applicable to agency members.
  - (8) Agency members shall not express in a public forum personal views on matters of political controversy, government policy or administration, where this is likely to impair public confidence in the existing or subsequent performance of their duties or which is likely to impair relations with other governments.
  - (9) Agency members shall not engage in personal conduct which exploits for private reasons or personal gratification their position(s) of authority, nor which would tend to discredit the professionalism of the agency. This rule would include the conduct of an agency member during a hearing or within the operations of the agency, as well as outside.
  - (10) Upon appointment to the agency, and thereafter, agency members shall arrange their private affairs in a manner that will prevent real, potential or apparent conflict of interest from arising. This is an area of activity which requires a degree of common sense. Socializing with persons that have dealings with the agency from time to time should, in my opinion be done under circumstances that speak loudly and publicly that the meeting or socializing is quite appropriate. On the other hand such meetings
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should not be held while the agency has a matter under consideration which could affect the party except where there is a large public gathering where many parties may be in attendance. It is not in the public interest to avoid events and meetings which may enable a member to have a better understanding of the environment within which an agency operates.

I believe that the creation of a Council would assist a number of agencies to create a standard set of Conflict Rules that could be widely acceptable.

It is also my recommendation that Management Board direct each agency to create a Conduct Committee to assist all members of the agency and to recommend policies for the agency to the chairperson. The Committee would be called the “Conduct Committee” and although it would have no direct authority, it would convene meetings to give advice, when sought by an agency member or the chairperson and create any special rules dealing with the conduct. I would recommend that the Conduct Committee be composed of three members (the Chairperson and two other members). The Committee would select its own chairperson. In my view, this is a sound way to carry out the Directive of Management Board and also would create a workable code for members. I believe that it is important to encourage agency members in a formal way to assess their obligations to the public, the agency and each other.

BEFORE APPOINTMENT all members should be provided with copies of what will constitute a “Code of Conduct”. Members should undertake to abide by the Code and to assure the Chairperson that there are no outstanding conflicts, and if there are, to have them assessed by the Committee. Everything every member does and how he or she behaves, and the reputation he or she earns, reflects upon the agency and every member of it.

AFTER APPOINTMENT every member must be familiar with the Code and abide by it. The authority of a chairperson to deal with breaches of the Code of the agency and the failure of a member of an agency to abide by or cooperate in maintaining the Code should prevail.

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I would recommend, therefore, that Management Board issue a Directive to all agencies providing that each establish a Conduct Committee, and that within six months create a Code of Conduct, a copy of which is to be filed with the Ministry to which the agency accounts and with Management Board.

The following could be accomplished by an amendment to the *SPPA*:

**52 (1) The chairperson of an agency shall appoint from among the members of the agency a committee to establish, monitor and enforce a code of conduct applicable to the members and employees of the agency.**

**(2) A copy of the code of conduct of the agency shall be filed with the minister responsible for the agency and with the Chairman of Management Board of Cabinet within six months of the coming into force of this Act.**



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## 8.8 THE RELATIONSHIP OF A MINISTER, A MINISTRY AND AN AGENCY

This section of Chapter 8 discusses the relationship between a Ministry, its Minister and the Agency. This is not a simple subject to discuss or to agree upon, because of the many forms in which this relationship is seen and practised.

On the whole, agencies have very broad mandates. The mandates are not derived from a Minister or a Ministry, but rather from an act of the Legislature. The fact that an agency may “report” to or be “accountable” to a Ministry does not mean that the agency has derived its authority from a Ministry. Agencies could just as well, but usually do not, report directly to the Legislature.

What is important to note is that agencies often undertake distinct functions not always related to the program activities of the Ministry. It is also worth noting that agencies sometimes are shifted from the umbrella of one Ministry to another. Section 5(1) of the *Executive Council Act*, R.S.O. 1980, c. 147 provides:

“Notwithstanding the *Legislative Assembly Act*, any of the powers and duties that may have heretofore or may be hereafter assigned by law to any minister of the Crown may from time to time by order in council be assigned or otherwise to any other minister by name or otherwise.”

There has never been a clear definition of the relationship between agencies and Ministries. In 1980, a Directive was issued by Management Board which required in all cases what is called a Memorandum of Understanding (MOU). This was a progressive step because the MOU was designed to outline the relationship between the agencies and the Ministries. In 1986, that Directive was altered, so that MOU are only required if the agency is not adhering explicitly to the criteria pertaining to its schedule, or if it provides its own administrative support services. However, MOU are, in fact, even more important in the everyday operations of all agencies. I believe that there ought to be an MOU for all agencies for the reasons I set forth in this section.

A high degree of ambivalence exists because on the one hand, the agencies are fed, financed, supported and appointed through the Ministries, while on the other hand, they are perceived by some to be “independent” of the Ministries. Still others see agencies as

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extensions of Ministries. The question of independence and accountability are discussed in detail in Chapter 2.

Fundamental to this section is the assumption that all agencies report to the Legislature, through a Minister (the Ombudsman, an exception, reports directly to the Legislature and not through a Minister). An exceptional agency may report to the Speaker rather than through a Minister, but for the sake of this discussion, I am going to assume that all agencies report to the Legislature through a Minister. Thus closely allied to the Ministry portfolio concept is the subject of Ministerial accountability for agencies.

It was clear from the interviews that I conducted both within the Ministries and within the agencies, that the extent to which the Ministries accept responsibility for an agency assigned to them, varied from agency to agency and from Ministry to Ministry, and from time to time. I think it can be fairly said that Ministries believe that agencies are accountable to the Ministry and the Ministry is accountable to the Legislature, but the rub comes when one asks what is meant by the word “accountable.”

The answers I was given were all over the lot. This I suspect is because most people have worked so long with agencies, that they have not really thought through the details of the word “accountable”. One recognizes that the responsibilities of a Ministerial portfolio are so complex and time-consuming, that it is difficult for a Minister to devote time to an agency, and as a result this task, in some Ministries, has been delegated to senior staff, yet the delegation lines are often not clear. There are exceptions, but the majority of the Chairpersons whom I interviewed expressed concern that the affairs of the agency do not receive more Ministerial attention. There are few clear understandings about reporting or communicating. There also are no structured channels through which agencies can communicate with other agencies concerning mutual problems which ought to be resolved on a broad basis within the agency system.

The need has increased, in my opinion, for the relationship between a Ministry and an agency to be rationalized and agreed. There ought to be a redefinition of the relationship with suitable linkage mechanisms between the agencies and the Ministries. What is often

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overlooked is that, in some instances, the agency must be left on its own to make a decision while in others the agency may have a very important part to play in the development of Ministerial programs.

I pointed out in Chapter Two, the two polarized views of agencies in Canada. First, there is the view that the agency is really an extension of the Ministry. Yet we know that such a view cannot be accepted. The courts have made that clear in many decisions. If an agency had been intended to be merely an extension of the Ministry, matters would have been left with the Ministry without creating an agency. It is clear that agencies are not extensions of Ministries. Nevertheless, there are senior persons who really believe that agencies are in fact an arm or a part of the Ministry. This view, where it exists, is referred to by most writers as the “Ministerial” view.

Second, there is the view that the agency is independent of the Ministry and operates very much like a court. This view is no more correct than the Ministerial view. The classic, ongoing example of the struggle between the forces of the bureaucracy and the forces to create the independent agency has been the battle in Parliament over the CRTC. Who is going to determine radio and television policy? Will it be the Department of Communications or the CRTC itself? The battle has waged back and forth for nearly 20 years.

On the Ontario scene, there has been a mirror image of the Federal CRTC issue, with the confrontation between the bureaucracy of the Ministry of Transport and the Highway Transport Board. By no means is the CRTC struggle unique at the Federal level nor is the Highway Transport Board struggle a unique example in Ontario.

Frequently I have mentioned in this Report that truth and reality are in the viewer's eye. A court will frequently look at an agency as if it were a court, and that being so, expect it to act like a court. A Ministry may look at an agency as an arm of the Ministry and feel that the agency ought to be more responsive to the wishes of the Ministry. Debate in the Legislature will centre around the independence of agencies. The legal profession, which is not unfamiliar with both sides of a street, will frequently argue for independence, and then turn around to lobby the Minister about an upcoming agency hearing. In truth, there is no consensus on a definition of an agency or the role it is supposed to play, because there are



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such divergent views, not only of why agencies exist, what role they ought to play, to whom, if at all, should they account, but most of all whether, and to what extent, they are independent.

It all depends upon who you are and what you want, as to where you will place an agency within the spectrum of responsibility. It is clear that an agency is in fact an agency. It has been given authority and a mandate to do certain things, and that while it is not independent of the Legislature, it is free to exercise its judgment independently. There is a world of difference between being “independent” and having “independence to make a decision”. An agency is not an extension of a Ministry, nor is it an independent body. It is accountable both to a Ministry for its support and to the Legislature. As well, it is obligated to follow practices and procedures which have been laid down by Management Board and other authorized agents of the Legislature.

The agency may be obligated to receive and follow instructions from a Ministry if the mandating legislation enables the Minister or others to issue directives to the agency. But in the absence of authority to issue directives or instructions to an agency, the courts have held that the agency is neither bound by government policy nor by any instructions issued to it by the Minister or anyone else. See the decision of the SCC in *Innisfil and Township of Vespra* [1981] 2 S.C.R.145.

The confusion is created by many factors.

- The draftsmanship that establishes the mandate of the agency.
- The necessity to speak generally rather than specifically.
- The courts which tend to expect agencies to conduct hearings as if they were courts.
- The legal profession which feels uncomfortable operating away from the formalism and elitism of court procedures.



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- The civil service which may want the best of both worlds, to receive the best and most independent decision available, while at the same time wanting to control it.
  - Many politicians who believe that “no news is good news”.
  - The media which is totally confused and unable to distinguish what is said from what is done.
  - Some agency members who view the ambivalence, with dyslexia; and,
  - The public with increasing disaffection and concern.

### 8.8.1 MEMORANDA OF UNDERSTANDING

We may never satisfactorily resolve the role and the relationship which exists between agencies and ministries, until we attempt to reduce to paper the terms of that relationship. No matter how the relationship may vary from agency to agency, there are a great many characteristics which are common.

One of the major accomplishments of a MOU is that it requires the parties to sit down and think out what they want their relationship to be and how important that relationship is to them. It is impossible for any Minister to attempt to evaluate the performance of an agency if he cannot say that he has established standards of performance against which performance can be measured. There is far too much taken for granted that agencies exist, without a sufficient realization of why they exist and the ways in which their performance or requirements should be measured.

For example, there should be entirely different criteria for an agency which exists in an appellate role as opposed to an advisory agency, or an administrative agency as opposed to a regulatory agency.

The presence or absence of a MOU should give one a clear picture of the understanding of a Ministry concerning the purpose and operations of an administrative agency. MOU are

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vital links in the accountability chain. We hear the independence and accountability of agencies frequently discussed with little or no recognition of the meaning of either word when applied to administrative agencies as opposed to courts.

My own view is that there ought to be a MOU between every agency and the responsible ministry. It may be that the original purpose of the MOU was a personal document between the Minister and the Chairperson of the agency. I have no problem with the continuation of such a document, but there ought to be in any event, an MOU (or call it what you wish) between the Ministry and the agency. It becomes obvious that the MOU that is required by Management Board today is a financial document. The MOU is not required unless the agency operates, more or less, on its own, and is not a Schedule One Agency. The real value of the Memorandum, is not just to delineate the financial relationships but the whole relationship between an agency and a ministry.

I believe that a sound Memorandum is very important to establish the working relationship for all agencies. Ministers come and go. Deputies come and go, as do other senior officials, not to mention the arrival and departure of hundreds of agency members and chairpersons every year. Word of mouth is not a sound way to establish acceptable operating arrangements between an agency and a ministry. If either the Minister or the Chair want, as well, to have a Memorandum between the Minister and the Chair that should cause no difficulty. The Memorandum can stay in existence between the agency and the Ministry until it is changed, but in the meantime it sets out the working relationship between the Ministry and the agency. The purpose should be to establish clearly what the Ministry can expect from and must provide to the agency, and as well it will establish what the agency is entitled to expect from the Ministry and what is expected of it in return.

These Memoranda are very important to each new Minister who takes over a Ministry. It is important to know the history of the relationship with the agencies for which the Minister accounts and which look to the Minister for support. It is equally important that each new Chair of an agency and all new appointees, clearly understand the relationship that exists between the Ministry and the agency.

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I would like to stress that I do not propose changing the “reporting” relationship of any agency with any ministry, but rather I stress the need to set out on paper for all to understand, the basic relationship which ought to exist between each ministry and each agency.

I recommend that each MOU should contain the basic common elements of the relationship. After that the Ministry and the agency can work out the balance of the terms on their own. I believe that if we are to get any coordination of the product and performance of agencies, these MOU are an essential first step, and that the Council can be of great assistance to many agencies, in particular, the smaller ones. I also believe that the Council can be utilized to monitor these MOU and make sure that they are kept up to date and understood by the agency members.

**I recommend that Management Board issue a Directive which requires that each Ministry enter into an MOU with each agency under its direction within 6 months subject to the approval of Management Board.** This MOU will remain in force until amended with the approval of Management Board and shall contain provisions covering certain subjects as set out in the Directive. Failing this, there shall be deemed to be an MOU which is deemed to contain certain provisions, until amended.

The subjects which I believe should be set out in the MOU should include the following:

**(i) Accountability**

This is a major issue and is frequently confused with “independence”. There are many subjects which this could include, but I seek only the basic coverage that the agency is accountable to the Legislature, through the Ministry in all ways except for the independence of decision-making. It must be very clear to those who know much about administrative agency law that the MOU cannot give or take away the powers which the Legislature has given to the agency. But the MOU, by clearly defining the accountability relationship can assist both the Ministry and the agency in terms of uncertainty, not only for them, but also for those affected by the decisions of the agency.

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## **(ii) Efficiency**

I believe that it must be made clear that the agencies ought to dedicate themselves to economy of time and money and not leave the responsibility for good management solely up to the ministries.

## **(iii) Appointments and Reappointments**

I believe that every Chair of every agency should be consulted before an appointment or a reappointment is made to the agency for a number of major reasons. This does not mean that the Chair can or should make the final decision or have any right to veto an appointment or a reappointment, but rather recognizes the fact that the Chair has the responsibility for the operations of the agency and the quality of its output. Both of these are the direct result of the quality of the members who are appointed.

Thus I believe that the MOU should establish that there will be consultation on matters such as appointments and reappointments. Several senior ministerial persons advised me that they saw no reason to consult an agency chairperson either about appointments, reappointments or proposed legislation. Yet to me this seems self-defeating, quite apart from thoughtless.

## **(iv) Budgets and Budget-Time**

Some Ministries consult with the agency and some do not, when the Ministry budget is being prepared within the Ministry. Some agencies are not even told what has been allocated for their operations. Frankly I believe that budget-time is a period of real soul-searching for everyone in the public service and the agency structure. It is a time for the Ministry to sit down at a senior level, once a year to review how things went and how things are likely to go in the up-coming year. There is a no more demanding exercise of self-discipline than for the Ministry at the most senior level, to go through the agency budget with the chairperson of the agency, to see whether the money is being spent cost-effectively.

The MOU should provide that once a year at budget-time that the Ministry will receive from each agency a budget submission which would include how it spent its last budget and



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how it intends to expend the upcoming request for funds. The agency budget submission ought then to accompany the Ministerial budget submission to Management Board. Whether and to what extent the agency submission is reviewed is up to Management Board.

Of course, the Ministry is held accountable at budget-time. However, there are agencies which not only are not consulted about their budgets ahead of time, but they aren't even told what has been allowed for the agency's operations afterwards. Thus I believe that the MOU should make it clear that the chairperson of the agency will be consulted and held responsible for the budget of the agency.

In the budgetary process, the chairperson of the agency should attend when money and staff proposals are being considered by Management Board. It is a major learning experience for the agency. Part of the responsibility for the operation of an agency is an understanding of how the agency is financed. Knowledge and responsibility go hand in hand.

#### **(v) Exchange of Information and Policy Guidance**

There is a great deal to be gained by regular exchanges of information between most, if not all, agencies and the Ministry responsible.

If a government has a policy, formalized or not, then the agencies should be informed. Once informed, it is very easy to put the matter on the table. I believe that a Government can not have a major policy going in one direction, while a number of important agencies go in another direction. Government policy is important. It is a matter of how it is handled and how openly. I have discussed Government policy elsewhere in this Report. I would encourage a greater exchange of meetings and information between agencies and Ministries than is now taking place. There are agencies which have been trying to have a meeting with the Minister for up to 2 years without success. There are other agencies which are only able to have a meal with the Minister once every year or two. Meetings need not always involve the Minister, but there should be a greater exchange of information and views.

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I have always taken the position that every agency owes it to advise the Minister of a major decision as soon as it is made so that he is not caught by surprise. Sometimes, once the decision has been made, it may be important, where there are broad government interests involved to brief the Minister in advance of the release. There are all kinds of oaths of secrecy available that Ministry and agency people have taken, which protect the public. To suggest that a Minister to which an agency is responsible ought not to be briefed about a decision that has been made and soon to be released, is naive. There is a big difference between seeking guidance from a Minister before a decision is made and briefing him about the decision after it is made.

#### **(vi) Consultation Concerning Mandate Amendments**

The Legislation of an agency has to satisfy the Government of the day because it is responsible to the electorate for the performance of the agency. On the other hand, the legislation has to be looked at through the eyes of the Chairperson of an agency because he has the responsibility to the Government for implementing that legislation. The implementation can be imperiled by weak or inexplicit draftsmanship. It can be imperiled by being bound by inappropriate and worn-out court procedures by which the agency must conduct itself until freed by legislation. The mandate can be imperiled by an out-of-date array of powers which need to be reviewed. I can not understand any reticence of Ministerial personnel to consult a Chairperson of an agency about needed or planned legislation. Not to consult the Chair as to whether he has amendments to propose or how the amendments proposed by the Ministry will affect the implementation of the Act by the agency is unwise.

I interviewed many Chairpersons who had never been consulted about their legislation. Many had proposed changes which were never addressed or even discussed. I even interviewed several who were never told that legislation was pending or that amendments had been passed by the Legislature. There is a Directive of Management Board (6-3) by which one would have thought that Management Board had made it clear not only that Chairs of agencies should be consulted before legislative amendments are presented to the Legislature, but that there must be an assessment of the value of continuing the agency.

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I recommend that Management Board issue a Directive to all Ministries that amendments proposed by Ministries be first presented to the agency involved to determine if they can be implemented and their effect. As well, the agency involved should be given an opportunity to advance for consideration of the Ministry any amendment sought by it. In addition to the Directive, there must be some way of monitoring the implementation of such a Directive since it is not being implemented on many occasions at present. I also recommend that before an amendment to the legislation of any agency is presented to Cabinet, that it be referred to the Council, for its comment.

The following is a proposed format for a Memorandum of Understanding.

## **MEMORANDUM OF UNDERSTANDING—A FORMAT**

### **INTRODUCTION**

This section should include:

- a) the purpose of the MOU (i.e. to establish communication channels, clarify relationships, clarify objectives and performance expectations of the Agency);
- b) the governing legislation in case of conflict between the provisions of the MOU and the Act, the Act that governs;
- c) who the MOU is between (i.e. to be executed by the Ministry and Agency);
- d) that the MOU is binding for a set term of 5 years; it is also to be reviewed once a year;
- e) a description of the mandate of the agency;
- f) an indication of a separation of the decision-making and administrative functions;

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## ROLE OF THE MINISTER

The Minister is responsible for such things as:

- a) presenting the estimates of the Agency as part of the Estimates of the Ministry;
- b) ensuring that the agency is informed of Ministry and Government financial and administrative policies which apply to the operations of the agency;
- c) ensuring the mandate of the Agency is fulfilled;
- d) reporting to the legislature;
- e) where there is a power to direct, to direct;
- f) evaluating the Chair and the agency.

## ROLE OF THE CHAIRPERSON

The Chairperson of an agency is responsible for:

- a) reporting to the Minister, as appropriate, on the activities of the agency;
- b) attending and/or making presentations before Cabinet, the Legislature, or committees of either, on matters affecting the operations of the agency;
- c) the conduct of the agency, and for the effective and efficient management of the agency's operations;
- d) developing strategic directions and policies for the Agency (ie. operational management, dealing with backlogs, funding, balance between part-time and full-time membership);



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- e) reviewing and recommending for approval to the Minister, the annual budget and multi-year plans;
  - f) hearings and decisions;
  - g) making recommendations on appointments and reappointments;
  - h) evaluating members.

### **ROLE OF THE EXECUTIVE-DIRECTOR/GENERAL MANAGER (if one exists)**

The Executive-Director/General Manager is responsible for acting as the Chief Administrative Officer of the Agency.

### **ROLE OF THE DEPUTY MINISTER**

The Deputy Minister is responsible for:

- a) ensuring that the Minister is advised of requirements of the Management Board of Cabinet Directives;
  - b) providing the Minister with advice and assistance in meeting assigned responsibilities;
  - c) providing a framework for assessing whether the Agency's mandate is being fulfilled in concert with approved government policies;
  - d) undertaking any assessment on behalf of the Minister and advising the Minister on the results;
  - e) identifying any need for corrective action and recommending ways to resolve any issues that are identified;
  - f) providing administrative support, as specified in the MOU.
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- g) ensuring the effective discharge of management responsibilities that are identified in the MOU by agreeing to work with the Executive-Director/G.M. In this regard, in order to ensure that both parties are fully informed on the administrative policies that are being followed by the Board, and to ensure that the Deputy Minister has sufficient knowledge of the activities and imminent issues, in order to assist the Executive-Director/General Manager to take appropriate corrective action as required, regular meetings between the Exec Dir/GM and the Deputy Minister should be held.

## **OPERATING RELATIONSHIPS**

The MOU should outline the following aspects of the operating relationships.

- a) the agency reports to the Minister through the Chairperson and the agency reports to the Legislature through the Minister.
- b) the Chair and the Minister should meet at regular intervals (it is recommended that they meet quarterly).
- c) the agency is funded by the Consolidated Revenue Fund.
- d) the Ministry staff will assist the Agency as required in preparing the objectives and annual budget.
- e) the agency will abide by the financial policies outlined in the Management Board of Cabinet (MBC) Directives, and Ministry financial directives.
- f) the agency will notify the Minister if it considers entering into any financial arrangements which could have an impact on the cash or debt management policies of the province.
- g) the agency can submit requests for funds directly to Management Board of Cabinet, as long as it has consulted with the Deputy Minister and appropriate Ministry staff.

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- h) consultation should take place between the Ministry and the Agency when initiatives are taken to amend the legislation or regulations which may affect the Agency's mandate or operations.
  - i) the Minister will ensure that the Agency receives Extracts of the Minutes of MBC, and decisions of Cabinet committees, when relevant to the operations of the Agency.
  - j) in the absence or illness of the Chairperson, or a vacancy in the Chairperson's position, the Vice-Chair will have all the powers of the Chair.

## **ADMINISTRATIVE RELATIONSHIP**

The MOU should spell out clearly the administrative relationship.

- a) the Agency is a Schedule I agency, as designated by MBC, and is therefore subject to all administrative policies contained in the Directives Manual.
- b) the Ministry is to provide the Agency with the same level of administrative support and common office services as it provides to all other Ministry programs. This should provide the Agency access to professional and technical staff of the Ministry.
- c) the Ministry will provide the same level of information systems development, maintenance and production services provided to all other Ministry programs. The Agency is responsible for Financial Control and Information Technology.
- d) French Language Services and Freedom of Information Services co-ordination are to be provided by the Ministry either directly or indirectly.
- e) the agency can engage persons to provide professional, technical or other assistance to or on behalf of the Agency, and may provide payment of remuneration and expenses of such persons in accordance with the Government's and the Ministry's policy. (i.e. Management Board has a policy on Consulting Services, see Directive 2-3).

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- f) the Agency is authorized to acquire outside legal assistance when it requires specialized legal expertise that is not available within the Ministry of the Attorney General, or when the Agency is holding its hearings and the use of a government Legal Officer would place the government and the Agency in a conflict of interest situation. This should be done in consultation with the Attorney General.
  - g) delegation of authority to extend hospitality should be outlined.
  - h) who has the signing authority for what, to what amount? Is it the Chair, the Deputy Minister, or the Executive-Director? Where is the delegation of signing authority found?

## STAFFING REQUIREMENTS

Staffing requirements should be clearly defined in the MOU.

- a) the Agency staff shall be public servants employed under the *Public Service Act*, and shall be eligible for all those rights and benefits accorded under the *Public Service Act*, and the *Ontario Manual of Administration* and relevant Collective Agreements.
  - b) the managing board of the Agency will be comprised of the Chairperson, Vice-Chair, and members appointed by OIC, subject to the approval of the Lieutenant Governor in Council. Also indicate in this section the number of individuals on the Agency as well as their term of office.
  - c) the Agency may appoint a GM/Exec Dir, from the classified service of the civil service.
  - d) all staff of the Agency are appointed under the rules of the *Public Service Act*.
  - e) pursuant to the *Public Service Act*, the GM is to comply with the Schedule of Delegation of Authority list, as amended from time-to-time by the Ministry directive in order to effect all personnel transactions for the Agency.
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## REPORTING

Reporting relationships should be established in the MOU.

- a) the Chair is designated as CEO; and,
  - responds to the Ministry and the Legislature on behalf of the Agency;
  - all communication between the Ministry and the Agency is to be channelled through the Chairperson;
  - presides at Agency meetings;
  - is consulted with regards to appointments to the Agency;
  - gives direction(s) to the staff;
  - has the authority to approve all financial responsibilities of the Agency.
- b) the Chair is to provide the Minister with timely information and advice, as appropriate, regarding issues that require the Minister's attention or that may raise questions in the Legislature.
- c) as the CEO accountable to the Minister for the interpretation and implementation of government policies, the Chair is responsible for the identification and execution of the financial, administrative and staffing support arrangements for the Agency.
- d) the Executive-Director/GM will report to the Chair and Agency on all policy and program operating matters and may request advice and support on day-to-day administrative matters from the Ministry's Executive-Director, Support Services Division.
- e) both the Ministry and the Agency shall circulate minutes of meetings, as appropriate. (In camera items can be excluded.)
- f) the GM is to provide the Deputy Minister with timely information and advice regarding matters affecting program operations.

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g) the Agency through the Chair and/or the GM agrees to provide reports to the Minister and the Deputy Minister:

- i) monthly management report on operations;
- ii) an annual report on the affairs of the Agency;(in some instances to be included as part of Ministry's annual report)
- iii) other special reports as may be required by the Ministry from time-to-time.

## **CONFLICT OF INTEREST**

Conflict of interest concerns should be identified.

- a) Who should inform whom, of what?
- b) A member of the Agency shall not use any information gained as a result of his or her appointment to the Agency for personal benefit.
- c) A member of the Agency who has reasonable grounds to believe that there is a conflict of interest in a matter that is before the Agency, or a committee of the Agency, shall disclose the nature of the conflict to the Chairperson at the first opportunity and shall refrain from further participation in the consideration of the matter as appropriate.
- d) The Chairperson shall record any declared conflict of interest in the minutes of the Agency and the minutes shall be sent to the responsible Minister's office.

## **AUDIT**

The MOU should clarify the following questions.

- a) Does the Provincial Auditor audit the Agency annually?
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- b) Are there any Ministry audits?
  - c) Are there any external audits?
  - d) Who is the Agency to inform in the Ministry of correspondence it has with the Provincial Auditor?
  - e) Who is the Agency to inform in the Ministry of correspondence it has with the Information and Privacy Commissioner/Ontario?

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## 8.9 THE CHAIRPERSON

The role of the chairperson of any agency should be set out in greater detail than described in most, if not all, existing legislation. Some chairpersons are stronger than others and some more experienced. Regardless of the personality of the individual, the responsibilities of the chairperson are similar in nearly every agency.

The chairperson is appointed by an OIC for varying terms and at varying salaries. In no case that I know of, is the chairperson selected by the members of the agency. And I would not recommend that this be considered.

The role of the chairperson is determined by:

- the provisions of the mandating legislation;
- the Memorandum of Understanding, and by
- custom and Common Law.

### THE MANDATING LEGISLATION

An example of a reference to the Chair of an agency contained within mandating legislation is found in the following sections of the *Ontario Municipal Board Act*, R.S.O.1980, c.347 as follows:

5(2)

“5. The Lieutenant Governor in Council shall appoint the members of the Board and appoint one member as chairman and may appoint one vice-chairman or more.”

“8. Where,

- (a) the chairman is absent or unable to act, a vice-chairman designated by the chairman; or
- (b) the office of chairman is vacant, a vice-chairman designated by the Attorney General, has and shall exercise the jurisdiction and powers of the chairman, including the power to complete any unfinished matter.”



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“13. The chairman shall from time to time assign the members of the Board to its various sittings and may change any such assignments at any time and the chairman may from time to time direct any officer or other member of the staff of the Board to attend any of the sittings of the Board and may prescribe his duties.”

“14. The chairman, when present, shall preside at all sittings of the Board, and his opinion upon any question of law shall prevail.”

It can be seen from the above that the Act is pretty general, and that it is not clear whether the chair is the Chief Executive Officer of the Board or not.

As I shall discuss further in this material, I believe that the chair of every agency in Ontario should be described as the Chief Executive Officer. I suspect that the chair is in fact the CEO of each agency, but if that is not the case, there can be easily provided an exclusion by way of a schedule to the amendment to the *SPPA*.

Section 63(1) of the *Workers' Compensation Act*, R.S.O.1980, c.539 as amended, creates the Chair as “the full-time chief executive officer of the Board”. Thus the concept of a Chief Executive Officer is not unique.

The purpose of the recommended change is not to grant more power or authority to any chair, but to legitimize existing practice and to make it very clear both to the staff and members of all agencies that the chairperson has the necessary authority to direct the operations of the agency. I believe that chairpersons should have the authority to make decisions on matters of law in relation to all the agency's operations and decisions.

There are several agencies, where there have been differences over the years between a senior member of the staff of the agency and the Chairperson as to who was really running the agency. This situation, in my opinion ought not to exist. It is to the chairperson that the Government must look for the ultimate responsibility for the performance of the agency. Very few of us have ever been a chairperson of a busy and important agency and perhaps have never thought much about the divergent relationships with which the chairperson must deal for better or worse.

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**FIRST** and foremost, there is the relationship between the chairperson and the other agency members and the relationship between the chairperson and the staff. There are any number of instances when the authority of the chair was challenged while in attempting to discipline a member of an agency or even require a member to conform to a standard of attention or performance thought appropriate for the agency. Someone has to have the authority to deal with these matters. It is not a matter of being heavy-handed but rather a matter of control of the agency. Often a new chair will have difficulty handling a member who has been with the agency for a number of years. There is not a great deal of tradition or convention relating to the position of the chair of an agency, as with most positions of leadership in a ministry or a government. In addition, the term of office may be short. It is often not possible to have the time necessary to grow gradually into the job and thereby build the stature slowly to direct an agency. We all have our idiosyncrasies but in the final analysis someone has to have the authority to require a degree of conformity in the public interest.

It is impossible to manage an agency properly and responsibly unless the ultimate responsibility for the staff lies with the chair. The determinant of the responsibility ought to be dealt with in the mandate of the agency and it is to that resource that one inside or outside the agency can refer.

**SECOND** is the relationship of the agency to the ministry through the chairperson. This relationship can be extremely important to the successful operation of many agencies. This relationship may be seen by how well the Ministry and the agency work together, but the foundation ought to be laid in the kind of MOU which I have recommended in this Report. Directive 6.3 of Management Board requires that there be, in some instances, a written MOU signed by the Minister and the Chairperson. I know as a fact from interviewing chairmen of agencies that there is a great deal of misunderstanding concerning the MOU. Some chairs had not known that there was such a thing as a MOU and others thought there was one but could not remember what it said. I find the directive unclear as to when there is to be a MOU. I have recommended that it be mandatory that "Operational Memorandum" be written and agreed between each Ministry and each agency, so that we develop some uniformity of approach. There are certain basic aspects to a working relationship which should

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be in writing and in common for all agencies. Thereafter, each agency and ministry can add whatever may be unique to that structure.

I found it difficult to understand how a chairperson would be willing to take up his position without first having a conference with the Minister to ascertain the nature of the relationship between himself and the Ministry. There are chairs of agencies who have never met the Minister to whom they report and who were never briefed upon Ministry policy matters or the direction of general government movement. It seems to me a weakness that could easily be corrected and much to the advantage of agency performance. I will go further and add that I have met chairs who were given no introduction to their job, their legislation, the goals to be achieved or the public policy options available for implementation. It looks to me as if chairs are often expected to arrive with a substantial baseload of knowledge both as to their job and where and how the agency fits within the structure of government and how it is financed. This could easily be corrected and I have outlined recommendations regarding this earlier in this Report.

### **Some Specific Responsibilities of a Chairperson**

#### **The Chairperson must:**

- a) understand where the agency fits within the general legislative structure and within the Ministry; and as well how the agency is financed and serviced.
- b) clearly understand the lines of communication within which the agency fits and to be able to distinguish between “independence of decision-making” and accountability.
- c) have a thorough working knowledge of the mandating legislation of the agency and the courage to apply what is likely an old piece of legislation to modern circumstances. To know how to make legislation work for the government rather than against it, is an art in itself.

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- d) have a working knowledge of other relevant provincial legislation, such as the *Ombudsman Act*, the Freedom of Information legislation and the *French Language Services Act* as examples.
  - e) be familiar with the relationship between the Management Board and the agency, the financing of the agency and operate within the Management Board Directives.
  - f) have a clear working concept of what statutory amendments, staff and money the agency realistically needs to carry out its mandate, bearing in mind that there is never enough money in government to do everything in government that everyone wants to do.
  - g) have a clear understanding of the staff needs of the agency and then to translate that knowledge into sound recruitment and training programs to attract, train and retrain the staff. Upon the quality of the staff rests far more than most bureaucrats are ready to admit. Frankly I believe that if an agency can recruit and train a well-motivated staff, it can accomplish any challenge put before it. I believe that staff recruitment and training is the primary task of every chairperson. If that is well carried out, it is likely that most other matters will look after themselves.
  - (h) see that the agency members are given a broad opportunity to further their training and widen their horizons. This kind of training lies in the field of political science, technical improvement, broadening writing skills and enough time to do well whatever tasks are allocated to members. The learning curve of many agencies may be as high as two years. Certainly that is true of the regulatory agencies.
  - (i) offer the kind of leadership to the agency, the staff and members that results in a well informed and coordinated whole. It is important to have it understood by the staff and the members alike that both are indispensable to each other and equal.
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- (j) offer to the agency and symbolize a sense of direction for the agency. Next to developing a strong, well-trained staff, I believe that accurate, well-articulated and reasoned decisions emerge from possessing a strong sense of cause and direction.
  - (k) preside at enough hearings in a year and to participate in writing enough decisions to be able to monitor the performance of both the staff and the members separately, as well as monitoring them as a unit. The confidence and ability to preside at large or small public hearings is learned over time. Nothing is more readily discernable than inexperience. A badly conducted hearing can destroy the reputation of competence of an agency, built up over a period of years.
  - (l) be able to offer to the Government or a Ministry useful, thoughtful and timely comments upon matters within the agency's mandate when those recommendations are either sought from the agency or are thought to be important enough to be volunteered without being asked.
  - (m) offer and maintain, thoughtful and responsive lines of communication between the agency and the constituents of the agency, including the media. These are consensus-forming influences, which if they are dealt with fairly, can make the work of an agency and of the Government run a great deal smoother.

If the above are in fact the tasks of a chairperson of an agency, I believe that it can be seen that the job description of a chairperson of an agency ought to be described as something more than: "...and one of them shall be designated chairperson..."

Accordingly I would recommend that there should be contained in an amendment to the *SPPA* the following:

**51(1) The Lieutenant Governor in Council shall appoint the members of the agency and appoint one member as chairperson and may appoint one vice-chairperson or more.**

**(2) The Chairperson of every agency, except those agencies which are excluded by schedule to this Act, are deemed to be the Chief Executive Officer of the said agency.**

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(3) Where,

(a) the chairperson is absent or unable to act, a vice- chairperson designated by the chairman; or

(b) the office of chairperson is vacant, a vice-chairperson designated by the Attorney General, has and shall exercise the jurisdiction and powers of the chairperson including the power to complete any unfinished matter.

(4) The chairperson shall from time to time assign the members of the agency to its various sittings and may change any such assignments at any time and the chairperson may from time to time direct any officer or other member of the staff of the agency to attend any of the sittings of the agency and may prescribe his duties with the agency.

(5) The opinion of the chairperson upon any question of law shall prevail.

(6) Whether or not the chairperson is a member of the panel which hears a matter to be decided by the agency, he may if he so chooses, take part in the making of the decision as if he has been a member hearing the matter whether or not he has heard all or any of the evidence thereof, so long as there has been a transcript of the evidence, and he has read the same.

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## 8.10 HEARING STANDARDS AND FACILITIES

The delivery system for hearings varies greatly from one agency to another. Sitting in comfort, being able to see and hear and to comprehend what is going on, when one has a right to participate, are all elements of natural justice. For generations we have concentrated upon the meaning of natural justice, as if notice of a proceeding and the right to be heard were all that constituted the principle.

As I have argued, the Rule of Law and the Rules of Natural Justice are exactly what the beholder wants to see. The fact is that if a person attends and cannot understand the language, or cannot see or cannot hear, and observes in great discomfort and amongst evidence of disorganization, this is not natural justice. Insufficient attention has been given to the material aspects of administrative agency hearings. This is largely due, in my respectful opinion, because there is no coordination of the overall hearing process in Ontario and the fact that not enough people have really stopped to think about it.

Some agencies hold hearings at which there is a very substantial representation of the public interest and of the economic interest of the Province. Other agencies hold hearings where the single issue is the right of a citizen to a pension or some assistance or protection from harassment or the like. Other agencies review a properly, or improperly removed license or franchise, or review some wrong committed in the name of product or farm marketing. There are hundreds of kinds of hearings held in this Province in a year. Altogether there are 20,000 actual hearings. There is a vast array of types of issues and mandates, just as there is a vast array of types of administrative agencies. But when it is all said and done, all hearings have a substantial common element, and it is the common element which we must be on guard to provide, quite apart from the individual requirements of hearings where they may vary.

Every agency in varying degrees at some time has a need for reporters who record the proceedings, some research, library facilities, translators, reproduction facilities, computers and associated equipment, legal staff, hearing rooms, mobile equipment, sound and recording equipment, display equipment such as overhead projectors, write-boards that reproduce what is written, instantaneous short-hand transmitters and printers, and the like.

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Often it is wasteful for each agency to purchase or otherwise satisfy these needs individually, but it is quite possible to provide, with some coordination, a central resource which could make whatever is needed available upon reasonable notice and at a reduced unit cost to the taxpayer.

Some agencies are well endowed, while others beg, borrow and scratch their way along, sometimes to the detriment of the public interest. What may be involved in some cases, is not so much additional expenditures but rather the sharing of existing material resources. With no coordination of a delivery system, there can be no sharing of resources.

By creating the Council which I have proposed, those resources could be provided to the agencies at a reduced unit cost, and particularly those agencies whose needs do not attract as much Ministerial or financial support as “the big ten”.

Not only are the material facilities vastly different in response to the old adage about “grease to the squeaking wheel”, but there are some inexplicable differences in the manner in which a hearing may be conducted between agencies. Where the differences are the result of the difference in mandate and obligation of the agency, that is one thing. But where the differences are without a meaningful basis, other than past practice, that is another. The public ought to feel relatively comfortable in each agency hearing, to the extent that the common elements are dealt with in a similar manner. There is no need for the material resources, the trappings of office and the general provision for a fair hearing to differ from agency to agency any more than there is generally from court to court. We should through the Council bring about a greater consistency of hearing standards. My enquiries lead me to believe that Chairs of agencies would support such a move so long as they have some input on form and how it is brought about. I am particularly mindful of the smaller agencies and the agencies which sit in many panels at the same time.

I would like to discuss one hearing aspect, but there are dozens of others that could be discussed, to show some of the important variations that exist. The person who records either on a tape, on paper or in some other fashion, what is said during a hearing, is called a “Court Reporter” or simply a “Reporter”. The record taken by the Reporter is not always transcribed. Sometimes the record is only transcribed if asked for by one of the parties or if



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there is an appeal from the decision of the agency. On the other hand, some agencies invariably have the record daily, put into a written form, called the "evidence" or the "transcript". There can and should be some known procedure about how, where, who, and above all who pays, and for what. But there is not. There is no coordination.

There is no coordination of whether pictures or recordings can be taken during a hearing, but there ought to be. There is no justification for the procedures being different in these and many other matters, yet there is no pattern.

I believe that the public ought to be comfortable and understand how these things can and should be done. I do not propose conformity, but rather coordination and understanding. I believe that the Council could bring about a more consistent way of dealing with these matters, than allowing 91 different practices to flourish. Furthermore, it is obvious that by creating a Council it will be possible to pool resources and to share them in a way that is cost effective and in the public interest.

I, therefore, propose the creation of the Council which can be a central resource for all agencies to support and upon which to draw.

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## 8.11 FRENCH LANGUAGE HEARINGS

There is legislation in place in Ontario which requires that French language services be available to the public. This includes agency hearings in French. The major difficulty with this requirement is not that it can not be carried out, but rather how it is to be carried out. The costs and time involved can run to millions, none of which will be unreasonable, unless what is done is wasted and unplanned. (Very often they amount to the same thing.) In addition to the cost of the process, there is a shortage of experienced translators and technical people and equipment to conduct hearings at a satisfactory level across this Province. The goal of the Language legislation can fail in terms of agency hearings unless it is implemented in some coordinated way in Ontario.

When I left the public service of Ontario in June of 1988, my perception of the overall readiness of agencies to hold hearings in both languages was inadequate. I do not believe from my interviews that it has improved significantly for the 91 agencies, since that time. Not only will the state of preparedness depend upon coordination of agency hearing performance, but so will the level and quality of their procedures.

I believe that every Ontario resident who is comfortable in French and who wants all or some part of a hearing to be in French, is entitled to have some or all of a hearing in French at a consistent standard of quality across all agencies.

There is no way we can have consistency or even fairness, in the matter of agency hearings in French, until there is coordination through one group of people which is itself, experienced in conducting hearings both in French and English.

There is a substantial difference between making French available within an operating agency and within a public hearing agency. Based on the present state of knowledge and preparedness, the Courts could hold soon after November 1989, that some hearings of some agencies constitute denial of natural justice. Such an event would be an unfortunate way to implement the proud goal of open public access in French to administrative agency proceedings.

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To what level of French service is the French speaking person entitled in agency hearings in Ontario? Is the service to be a little French, some French, or a lot of French, and is it to include a whole hearing in French, including some or all of the documentation?

The present Guidelines do not make that clear nor is the Act clear. What could happen is that after a long and expensive hearing, a person could allege that he or she did not really understand enough of the real issues, and apparently from the decision, the panel did not understand the real nature of the evidence. Therefore, the hearing ought to be reheard. That kind of a plea involves a discretion of the court, but if the court holds that as a right, the party was entitled to more than was received, then there is no judicial discretion to remedy. What is good enough ought not to be left up to 91 agencies to decide differently in terms of genuine common basic rights to a hearing that meets the goals of the legislation. Nor should we leave it up to the courts to tell us what we meant when we wrote the *French Language Services Act*.

There are many issues upon which the Guidelines offer no guidance. I know that one view of the French Language legislation is that all of the written or pre-filed material may be required to be available in French. When one realizes that in a typical Hydro hearing before the Energy Board, there can be 7,000 pages of pre-filed evidence, one can grasp the enormity of the problem. Translating all of this material on time in a Hydro hearing would be impossible, not just impracticable. There are not enough translators, but even the translators would have to be very comfortable in the technical nuances of the testimony. It would cost the users of electricity millions of dollars a year added to their rates to make this translation service available. I have heard it said that this kind of difficulty will not arise under the legislation. The fact is, that it can and will arise for many agencies, unless ways are anticipated to avoid the difficulties.

What the agencies need is coordination of how to meet this challenge when it arises. The Council would be of effective assistance, not only in modelling how agencies should prepare for hearings in French or with a French component, but also centralizing the resources that these hearings will require. The more one studies the basis of judicial review, the more one concludes that the courts will not give much, if it can be demonstrated that there is strong

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consideration to provide the service. The issue will be “what was assured by the Act, and was it available?”

I have reason to believe that the French Language legislation and the procedure before several Boards will be challenged strongly, soon after the effective date of the Act. In fact, I know of draft pleadings to test the legislation, now under preparation.

Some agencies engage reporters to transcribe the evidence and some do not. It may be that the entire transcript will have to be in both French and English. This involves many complicated matters such as instantaneous translation equipment and production materials.

There is also the serious matter of obtaining panel members who are bilingual and have the expertise required for certain specialist agencies. Some agencies may have to have sufficient members who are bilingual to fill a whole panel. May I observe that not having a full panel of bilingual members may amount to a denial of natural justice. Having one bilingual panel member on a panel of three, may not satisfy the requirements of a fair hearing under the Act. Credibility rests upon being able *yourself* to follow and test the witness and not through someone else no matter how trusted! In the past, we have provided a translator or one member of a panel of three, to assist the witness or a party. But that may not be good enough to provide the assurances of the Act commencing December 1, 1989. The precedents of the criminal courts with respect to the use of French may not be applicable to agencies.

With many agencies, there is already the problem of delay in the publication of decisions. The time taken to translate decisions will cause many problems to the public for the first few years until the demand for translators and equipment equals the supply. Added to this, is the delay in getting the evidence translated in advance or the transcripts available before argument or before decision-writing time. Where any agency acts in the public interest, as part of its mandate, it will be necessary to have enough of its members, staff and counsel at hearings, understand French fluently enough to examine, cross-examine and assist the public in French, otherwise the legislation will soon lose its meaning in terms of serving the public interest in agency hearings.



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There are problems dealing with notices, pre-filed material and other hearing documents and records that may be required to be translated into French on the spot, failing which there could be reasonable requests for long adjournments. None of the above is intended to suggest that the legislation is not capable of implementation. The issue is how is it to be implemented and according to what standard? Above all, by whom and how will it be coordinated?

Therefore, I recommend that the Council be established, and that it have the responsibility to coordinate and monitor the methods by which the 91 agencies which hold hearings and make decisions will assure the availability of French language services to the public.

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## 8.12 PUBLIC ACCESS

Agencies must make their services available to potential users. The best agency in the world would be ineffective if it is inaccessible. The Australian Administrative Review Council has recognized this problem and is conducting an access project. The President of the Council has advised me that they have discovered that

“...Impediments to access include lack of knowledge about the basic rights, lack of understanding about how to use them, money ( for some forms of review ) and apprehensions about dealing with government generally or in a particular case, which sometimes may be attributable to the socioeconomic or ethnic background of the client.”

The same impediments exist in Ontario. There are some solutions.

Money to fund hearings before agencies may be available from legal aid in individual cases. Provision may be made for substantial intervenor funding such as that contemplated in Bill 174. Some agencies have the power to award costs to a party in compensation for the expenses incurred in conducting proceedings.

There are other steps which can be taken and with which the Council can assist.

**First**, an agency can ensure that the public generally, and potential users particularly, know about the agency and the legislation or program administered by the agency. An agency may have the impression that it is serving its constituents well when in fact there may be many non-users unaware of the existence of an agency.

**Second**, where potential users are aware of their rights, they may still be reluctant to pursue this recourse. This may be due to fear, illiteracy, misinformation or language barrier. Agencies can ensure that every effort is made to overcome these barriers. This means that agencies must have information brochures and sometimes staff available to assist those who need help. The Council would assist in providing translators, in training staff, and in preparing brochures and information material.

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**Third,** agency members must be equipped and trained to deal sensitively and effectively with unrepresented parties. Where a party is unrepresented, or has difficulty understanding the proceedings, it is the duty of the agency to ensure that the interests of the party are protected and the merits of the parties' case explored fully. The Council can assist in training members and staff in these areas.

**Fourth,** agency forms, documents, information booklets and brochures are of no value unless they are comprehensible. The material must be understood by those they are intended to assist and inform. This means that agencies must put themselves in the minds of their constituents. Materials must be drafted in plain, simple terms.

**Fifth,** in my opinion every agency should publish in French and English a simple brochure which tells the public why the agency exists, how it operates, and of greatest importance, provides an easy to follow description of how one can participate in the hearing process of the agency. Some agencies have excellent pamphlets which tell the public how it can participate in the public hearings of the agency. Some agencies have passably written publications. However, many agencies have little or nothing by way of material to help the public understand how it can meaningfully participate.

The public has a right to participate in the hearings of those agencies which hold public hearings, and furthermore, the public pays the taxes that finance those agencies. There is a sizeable chasm between having a right to participate and being able to participate meaningfully, particularly to participate without a lawyer.

The material should be presented in such a way that, while not encouraging public participation for the mere sake of taking part, should nevertheless make it clear that the agency holds public hearings so that there can be public input. Each step should be clearly and easily described, and then the agency should put those steps into practice.

Some agencies such as the Parole Board have videos to describe how a prisoner can apply to the Board for parole or, where parole hearings take place without an application, and how the process works. The National Energy Board has an excellent pamphlet to describe its operations and how someone can take part in the proceedings. The Ombudsman's Office

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has made concerted efforts to bring its services to the attention of the public with some success. A number of agencies have in existence excellent brochures which could be studied to advantage.

What we are talking about is not advertising the existence of the agency, as much as it is to announce the availability of a service and how the public can take part in it. With some agencies, it may not matter whether there is public use of the agency or not, but with other agencies, such as the Social Assistance Review Board or the Rent Review Hearings Board, it matters a great deal that the public understands that the process is open. Irreparable damage can be done within hours of an unfavourable ministerial decision in a social assistance matter for example. Rapid, easy access to many agencies is tantamount to justice. It is easy for a human right to die, waiting to be heard.

The Council can be of considerable assistance in the creation and circulation of Participation Guidelines. Having a right is one thing, but knowing how to exercise it, is another. It is worth saying over and over again that one of the major difficulties which administrative agencies as a whole face, is that there is no central coordination of their activities. This coordination can be brought about initially by cooperation and coalescence through the Council. If that fails, the system will not satisfy either the government or the public.

Each year, each agency should be required to file with Management Board and the Council a response to a questionnaire which will disclose whether or not, amongst other information, there exists such an information brochure and if not, the date by which it will be in circulation. A copy of the brochure should be filed with the Council for easy public reference.

I have attached as Appendix 8-2 a useful brochure of the Social Assistance Review Board as an example of the kind of brochure which is instructive in this regard.

In conclusion, I recommend that Management Board issue a Directive to all agencies requiring that they publish, in simple French and English, a Public Participation Guideline Brochure. A copy of the brochure should accompany every mailed notice of a hearing and



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published notices should contain a set description of how the public can participate in the hearing. One copy of the brochure should be filed with the Council and that each agency shall respond once a year to a standard questionnaire about this and other administrative practices that may be established by Management Board or the Council.

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## 8.13 DRAFTING LEGISLATION

### INTRODUCTION

The quality of the draftsmanship that goes into the mandating legislation of an agency is as important as the substance of the concepts around which the legislation is built. Therefore, I have written a brief section on the drafting of legislation, borne out of some many years of overseeing draftsmen and experience with drafting it myself.

#### 8.13.1 DRAFTING

Legislation drafting is the art of describing and defining a policy or program in words which are capable of enforcement. The reader will note that there are two components in the drafting process. First, the policy or program must be understood and defined. Second, the words used to define the policy or program must conform to the rules of interpretation which will be applied by lawyers and the courts in guiding those who carry out the policy or program.

### THE DRAFTING PROCESS

At the outset, it is important to realise that when I speak of the “drafter”, I mean more than the individual who may have written the words of a statute. It will be clear from my description of the legislative process that a statute has many authors and that many contribute for better or for worse to the final result.

Draft legislation is the work of legislative counsel, ministry solicitors, other ministry staff including the line managers responsible for the affected program, fiscal experts, communications experts and others.

The drafters will first attempt to define the policy or program which is to be made into law. The policy aspect is the work of ministry staff, fiscal analysts, policy analysts and so on. Once the policy is defined, it is the work of lawyers specialised in drafting legislation, called the Legislative Counsel to translate the language of the policy analysis into words which conform to the rules of statutory interpretation. These words take the form of a bill.

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Once a draft bill is prepared (and there may be many drafts) and approved by the Minister and other ministry officials the proposed bill is approved by Cabinet, usually the Legislation Committee. The bill can then be introduced in the Legislative Assembly.

### 8.13.2 LEGISLATIVE PROCESS

Bills are given first reading to introduce the bill to the Assembly. There is a speech by the Minister introducing the bill, but there is no debate or amendments upon first reading.

In due course the bill will be called for second reading. It is at this stage that there is debate on the principle of bill but not on its details. After second reading a bill may be sent directly to third reading or to a standing committee of the House or to Committee of the Whole. Standing committees can and usually do hear public submissions. The Committee of the Whole cannot. Both the Standing Committee and Committee of the Whole will consider each clause of the bill and will vote on proposed amendments. After a Standing Committee has reported back to the House, the bill may then be given third reading or be referred to the Committee of the Whole for further consideration.

While it is possible to have debate on third reading, it is not common. No amendments are permitted at third reading.

After third reading, the Lieutenant Governor will be asked to give Royal Assent to the bill (now known as an Act). The Act then comes into force or upon some other date set forth in the Act.

### 8.13.3 TYPES OF BILLS

There are three types of bills. Government bills are introduced by a minister and form part of government policy. Private Members bills are introduced by a member who is not a minister. These are attempts by private members to influence public policy. While some Private Members' bills receive second reading, most "die" on the Order Paper. The third

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type of bill is known as a Private Bill. These are put forward by a private member on application by an individual or group for special relief, i.e. to fix an estate or a title to lands. Usually these bills are passed without debate in the House but they are scrutinized by a Standing Committee.

Private Acts are bills that give some form of private relief. Other bills are Public Bills dealing with public issues. A special act is limited to a particular group of people. A general act is of general application.

The comments, which follow, apply only to government bills having general application.

### 8.134 LEGISLATION RESPECTING AGENCIES

I said that the words used to describe policies and programs must be capable of enforcement. The language of the statute must conform to statutory rules of interpretation which lawyers and judges will respect while interpreting the statute.

Three principles are applicable to agencies.

**First**, an agency draws its authority from the mandating legislation. Judges are reluctant to give agencies powers which have not been clearly specified. The authority contained in such legislation is either explicit or implicit. As I have discussed, an agency ought not to rely on its implicit powers. Therefore, it is essential for the authors to give the agency sufficient explicit powers to enable it to perform adequately.

**Second**, the mandate of the agency must be carefully described otherwise the agency may be unable to fulfil the task assigned to it by the Legislature. Failure to define the mandate adequately may involve the agency in frequent judicial reviews on jurisdictional grounds because the courts are reluctant to allow agencies to get into areas of endeavour unless the legislature specifically permits.

**Third**, the agency must carry out its functions in accordance with the rules of fairness and natural justice. Any departure from these rules will be scrutinized unsympathetically by the

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courts. If for the particular purposes of the agency, it is necessary to depart from rules acceptable to the courts, (and as I have discussed sometimes this is necessary), the provisions must be very clearly spelled out in the legislation. The court rarely gives the agency the benefit of the doubt. This is particularly important in the case of agencies which perform adjudicative functions. For these reasons it is critical to have a well drafted statute which gives the agency appropriate powers, duties and procedures.

### 8.13.5 PROBLEMS FACING DRAFTERS

There are a number of problems facing the drafters of legislation which creates an agency. Some of the problems arise in analyzing and defining the policy or program. Some of the problems arise in ensuring that the words used to define the policy or program conform to the rules of interpretation. Some of the problems arise from the legislative process itself where both the substance of the policy and program and the words used to define the policy or program may be altered after scrutiny, debate and compromise.

Where a new agency is created to deal with a particular problem, the drafters, namely, Legislative Counsel, ministry solicitor, and policy staff, must anticipate the problems which are likely to be faced by the agency. How will the agency enforce its process? Who will want to challenge agency proceedings? What powers are required? What evidentiary problems will there be? What is the nature of the industry being regulated? Where are the profit centres? What are the real interests which underlay the operation of the agency? Can agency process be misused to the advantage of some of the participants? What will be the effect of appeals or judicial review of agency decisions?

All of these policy aspects must be worked out in detail with a view to their practical implications. It is essential to understand the industry business or group affected, how it works, the interests at issue, and how the players view themselves, (which might be quite different from the way in which the public or the civil service views them). When the drafting stage is reached, it will be essential to have a good grasp of the principles of drafting; what must be said, what can safely be left unsaid because it is covered by the common law or statute law, and how to say what must be said, clearly and concisely. The

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proposed legislation must mesh neatly with other statutes in terms of style and content.

It will be essential to have a good grasp of the principles of administrative law, both the general rules and the exceptions to those rules and a sense of the way in which courts are likely to interpret the legislation. This requires experience in the courts and before agencies. One should never lose sight of the fact that less than 1/10th of 1% of all agency decisions go before the courts for review, this is one of the reasons that it is a shame that administrative law is taught at the Universities and Law Schools for the most part by observers through the telescope of Judicial Review.

It is also important to have a good grasp of the network of other relevant government and ministry legislation, policies, plans, other enforcement programs, subsidy programs and so on. The legislation should mesh with the array of other programs and policies which together, encourage the constituency, business, industry or group to accept the agency's program in both language used in the legislation and policy.

It is extremely rare for one individual to have a thorough grasp of all these areas. Several types of experts should contribute their respective skills and knowledge to the final result. A team effort is needed. One of the members of the team ought to be, but seldom is, the Chair whose agency will have to work with and implement the legislation. Where any one of the elements noted above is missing problems will occur. Sadly and predictably, problems have occurred, particularly in legislation involving agencies, largely because the agency involved was not consulted.

Even if all the necessary elements are present and a suitable draft bill is introduced in the Legislative Assembly, the draft bill must then be subject to the scrutiny of the political process. In Committee, there will be motions to amend the legislation. As a matter of practice, government motions to amend are drafted by Legislative Counsel. But sometimes opposition motions will not be seen by Legislative Counsel until moved in Committee. This may lead to drafting problems as compromises may be made in language without thorough consultation with Legislative Counsel.

Moreover, the policy implications of amendments must be dealt with by the minister and staff on the spot. This means that the minister and the ministerial advisors (this should

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include a representative of the agency affected) must have a good understanding of the basic principles and concepts set out in the bill to be able to respond adequately to motions to amend it. Amendments which look beneficial on the surface may contain contradictions or traps for the unwary.

Historically, there has been a tradition that proposed legislation should not be released before it is introduced into the Legislature. I know that there may be some financial acts that require this kind of security, but most acts could be circulated well ahead of introduction, for comment and recommendations. This can be done formally or informally. When I introduced the legislation which established the Ministry of Energy I gave it a very broad circulation for nearly a year among dozens of organizations and hundreds of individuals. The legislation, like all legislation, raised concerns. But after people had a long chance to look it over, it received a strong endorsement in the end. I know that this cannot be done in all cases, but I believe that it can be done more frequently than is now the case relative to the creation of new agencies or making changes in existing agency mandates. I note that consultation on proposed legislation is becoming more and more common. The Ontario Securities Commission and the Ministry of Labour, for example, have long had a policy of consultation. This development should be encouraged.

Another problem is the continuing influence of Dicey and McRuer. Drafting is an art practised for the most part by lawyers for the use and guidance of other lawyers. This means that any departure from the values and assumptions of Dicey and McRuer will be viewed by lawyers and judges with great caution and scepticism. Thus even if a procedure or power is sensible, realistic, or necessary for the public good in the circumstances of the industry or business to be regulated, there is a good chance that the procedure or power will not be added to the draft policy unless it conforms to the Dicey-McRuer values.

Often the drafter's place in the drafting hierarchy, rather than the drafter's experience in the matter being legislated will dictate certain provisions which can later, if adopted, be a serious handicap.



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The drafter owes a duty to the Legislature to point out provisions which do not quite square with usual standards, should a minister propose and the Legislature accept departures from usual standards in the public interest.

Another problem is the absence of consultation with agency chairs on policy issues. I believe that when an agency is going to be created or have its legislation amended, there should be consultation with the existing Chair (where the subject is an amendment) or with the Council which I propose (where a new agency is being created). There is no substitute for getting some advice from some experienced operators of existing agencies. I believe that the Council can offer assistance and the experience of many agencies to the drafting teams. I know from my consultations with experienced ministry counsel and drafters that anything which contributes to better results will be welcomed.

Another problem facing drafters is time. Drafting takes time. Drafts which look simple and clear are often the result of many long hours of revision after revision. Many statutes may be affected by a proposed bill. Cross checking to ensure a neat fit takes time. The pressure to draft legislation within a tight time schedule can be particularly onerous when a minister sees an opportunity to introduce legislation at a politically opportune time. This is true of legislation introduced in response to a pressing social concern or particular problem or issue.

Drafting is a team effort. Every team needs a leader. Unless one person is clearly designated as the person in charge of the process, all efforts may fail. The team leader must have access to the minister and the more information that the individual possesses about the respective roles and skills of the other team members, the better the result will be. If legislation is weak, it is usually because the elements of the team have not been properly brought together or a member of the team is weak, or more frequently because there is no designated team leader. Where the legislation involves an agency, the chair of the agency should be a key member of the team advising the minister.



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## AN EXAMPLE

It may be of assistance to the reader to study the recent case of *Re Coates and Registrar of Motor Vehicles* (1989) 65 O.R. 2d 526 which gives us a classic example of the types of problems which can occur when some of the problems just noted are not anticipated and resolved.

I referred to this case in chapter 4 to illustrate the balancing of interests in administrative law matters. Now I refer to the case again to illustrate a different point. The reader will note that both policy and wording issues were not dealt with adequately. A failure to appreciate how the motor vehicle dealer industry worked led to problems in the enforcement of legislation. Precedents from other statutes were used without an understanding of how the particular circumstances of the industry required different wording.

The powers and procedures governing the operation of the agency were not fully provided for in the legislation. Failure to understand the effect of delay in litigating led to unnecessary risk to the public.

## THE FACTS

I shall recite the facts briefly. An order of the Commercial Registration Appeal Tribunal (CRAT) approving the decision of the Registrar of Motor Vehicle Dealers, to revoke the registration of Centennial and Brown as dealers and Coates as a motor vehicle salesman under the *Motor Vehicle Dealers Act*, was appealed to the Divisional Court.

Coates was the sole shareholder and president of Centennial. Coates and Centennial had been charged under the federal *Weights and Measures Act* with tampering with odometer readings. Centennial pleaded guilty. The charges against Coates personally were withdrawn. On the conclusion of proceedings under the federal legislation, the Registrar gave notice of his proposal to revoke the registrations of Centennial and Coates under section 5 of the *Ontario Motor Vehicle Dealers Act*. Centennial and Coates appealed to CRAT. After the hearing, CRAT ordered the registrar to carry out his proposal. Centennial and Coates sought judicial review of the decision by the Divisional Court. The Court ordered the

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licences of “Centennial and Coates” to be restored! I cannot help but comment that there is something very wrong somewhere when a court in Ontario is obliged to allow a company which has pleaded guilty to a serious public offence, odometer tampering, to have its licence to sell cars under false representations, restored to it.

In the comments which follow, I am not trying to blame anyone involved with the original legislation, although one could hardly be proud of the consequences of its plain and obvious English, as found by the Divisional Court. The case while not of large social magnitude is of profound illustrative significance. Part of this significance I discussed in Chapter 4, where I compared balancing the private interests of individuals with the need to protect the public interest.

## **1. FAILURE TO UNDERSTAND THE INDUSTRY**

First, failure of the authors to understand the nature of the industry and how corporations are structured led to a gap in the legislation.

The registrar based his proposal to revoke on section 5 (1) (b) of the Act. The section states:

“5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
- c) the applicant is a corporation and
  - i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
  - ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance

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with law and with integrity and honesty; or

d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.”

The issue was whether the conviction of the corporate licensee gave the registrar sufficient grounds to proceed with his proposal respecting both the corporate and individual licensees under section 5.

CRAT had found that the conviction against Centennial constituted *prima facie* evidence supporting a presumption that Coates was personally involved in the wrong-doing to which his company pleaded guilty. CRAT had stated (at p.529) that:

“... where close control and beneficial ownership were entirely vested in one man, we would have to see evidence that that person, the person in charge, was not involved in the established wrong-doing and in this case no such evidence was offered...We are making a presumption that the person in charge was also informed, aware and/or responsible for what was going on.”

Accordingly CRAT ordered the registrar to carry out the proposal to revoke. Mr Justice Reid rejected this interpretation:

“The tribunal thus presumed that Centennial’s corporate conviction proved the personal wrongdoing of Coates. There is no basis for this presumption anywhere in the Motor Vehicle Dealers Act, or in any principle of evidence.”

CRAT had also ordered the revocation of Centennial’s licence on the basis of section 5.

In the Divisional Court, Mr. Justice Reid summarized the argument respecting this section as follows: (at p.532)

“The argument was made to the tribunal by Mr. Carter that because s. 5(1)(c) explicitly referred to corporations, that subsection alone applied to the situation of the corporations. It was submitted that the registration was a right, akin to a property right, and that registrants were entitled to a strict interpretation of legislation providing for an interference with that right by revocation of an existing

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registration. The submission depends upon a careful reading of s. 5. It is that since s. 5(1)(c) refers exclusively to corporate applicants, s. 5(1)(a) and (b) could not operate in respect of a corporation. Thus the corporation's convictions could not affect its registration by virtue of those subsections. Only the past conduct of the corporation's officers or directors could disentitle a corporation to registration. In the absence of the presumption implicating Coates, there is no evidence of misconduct on the part of the officers or directors of Centennial."

and at p.533

"To reject the submission is, of course, to reject the plain words of the statute, in favour of one that would permit the tribunal to fulfil its duty as it saw it.... Appellants are thus entitled to a plain reading of the Act; it is not even necessary to insist on a "strict" reading, for it is not ambiguous: ... The past conduct of officers and directors alone is relevant to the grant or continuance of a corporation's registration. Why the legislature saw fit not to include reference to the past conduct of a corporation is not clear. What is clear is that a statute affecting livelihood must not be warped to fit the objectives of an administrative tribunal however laudable they might be."

The result was the Divisional Court restored both licences.

This was a failure by the drafters to establish a good policy. They failed to take into account the nature of the industry. Many car dealerships are owned by corporations which are controlled by one or two individuals. If this had been understood it would have been easy to foresee that the registrar would need to be able to propose to revoke a licence for the improper conduct of any of the people connected with the corporation whether officer, director, shareholder, dominating mind, employee or otherwise. (In fairness I must add that the section and others like it were drafted in the mid 1960's. At that time the section respecting corporate ownership may have been adequate. Maybe the issue was addressed and rejected for any number of reasons.) It would not have been difficult to add a section to deal with the issue. Mr. Justice Reid cited a section from the *Weights and Measures Act* which would have accomplished exactly what was needed:

"37(1) In any prosecution for an offence under this Act it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his



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knowledge or consent and that he exercised all due diligence to prevent its commission.”

The gap could easily have been filled with the addition of such a section. What, of course, is offensive, is that the weakness should have been obvious. Not only has the public had to pay the cost of this travesty but the Act remains unamended, (and many acts containing similar wording go unamended). In the meantime, the old odometer adjuster is back in business.

## 2. USE OF PRECEDENT

It is good practice in drafting to use identical words and phrases to express identical thoughts. This makes the interpretation of statutes easier and more consistent. Problems can arise where the same words and phrases are used in what looks like but what is not the same circumstance.

Drafters may use precedents without due regard for the specific circumstances and problems to be dealt with. Something like this happened in the drafting of the Motor Vehicles dealers legislation. The wording found in section 5 of the *Motor Vehicle Dealers Act* can be found in many other licensing statutes. For example section 11(d) of the *Ambulance Act*, (R.S.O.1980, c.20) states:

“11... the Director may refuse to issue a licence,

- (d) where the past conduct of the applicant or, where the applicant is a corporation, of its officers and directors, affords reasonable grounds for belief that the ambulance service will not be operated in accordance with law and with honesty and integrity.”

There are other examples. See section 6 of the *Debt Collectors Act*, R.S.O.1980, c.113 and section of the *Mortgage Brokers Act*, R.S.O.1980, c.295 for virtually identical wording. What may apply in the one industry may not apply in another, yet the same words were used. Moreover these sections and others like them were not amended after the Coates decision. Why should this section which turns up in much legislation, not be amended? The Coates case has shown us a serious gap in the law. Many statutes are affected. Several ministries

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are affected. There is a need to take coordinated action to fix errors like this quickly for all similar agency legislation. While it is useful to have consistency of approach in licensing statutes, it is not desirable where the different circumstances require different action and solutions. Precedents are useful but the drafter must take into account special circumstances and the particular demands of the problem to be solved.

### **3. KNOWLEDGE OF ADMINISTRATIVE LAW — REHEARINGS**

My third observation is that a greater knowledge of administrative law could have assisted in the drafting of the Act. The powers of the Divisional Court on appeal were quite broad. Section 11(5) of the *Ministry of Consumer and Commercial Relations Act*, R.S.O.1980, c.274 under which Act the appeal was brought, states:

“11(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.”

Once Mr. Justice Reid determined that CRAT had erred, he was faced with what to do under this section. He decided as follows: (at p.533)

“As the matter was prejudged there is no point in remitting it to the tribunal for reconsideration. Considering the time that has passed — approximately six years since the conduct complained of, it would not be fair to order a new hearing.”

Mr. Justice Reid was clearly concerned about the inordinate delay in resolving the matter. He ordered accordingly. But had the delay been less, it would have been difficult for him to order CRAT to rehear the matter in view of the attitude taken by CRAT. On the other hand, had the statute provided for a rehearing by CRAT constituted with a fresh panel, there would have been more scope for the court to fashion a remedy. The need for well thought out rehearing procedures could have been anticipated. Obviously such situations may not occur frequently in the life of a particular agency, however, if one examines the experience

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of 91 agencies, it will be seen that the lessons learned by one agency can often be applied to the benefit of others. The Council could provide wide ranging experience in similar situations.

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#### 4. KNOWLEDGE OF ADMINISTRATIVE LAW—PROTECTION OF THE PUBLIC WHILE PROCEEDINGS CONTINUE

Throughout the proceedings, the dealer remained in business. The registrar filed the notice of proposal to revoke. A hearing was requested. All the while the dealer remained in business. Once CRAT decided that the registrar had grounds to proceed with the proposal, the dealer launched an appeal and applied successfully for a stay of CRAT's decision. This meant that the dealer stayed in business.

Where the purpose of legislation is to protect the public, it may not be desirable to permit a business to be operated while proceedings continue. Proceedings of this sort can go on for several years, and in this case, 6 years!

This also underscores the bad results which can prevail arise where the Rule of Law values go too far. The individual right to a hearing prevails over the public interest, that is, protection from dishonest or incompetent businessmen. Proceedings may take years to complete. The operator will do everything necessary to delay proceedings because more often than not the operator will be making a profit from the operation. Indeed the more dishonest or dangerous the operation, the greater the profit will be. The public pays and the public suffers. And yet the public interest is identified by Dicey and McRuer with the right of the dishonest or dangerous operator to stay in business and to profit by the delay until the "law" has run its course.

But if you try to introduce legislation to suspend a licence before a hearing for example, and to put the burden of delay on the operator, you may find this and other legislation designed to enable government to act swiftly to protect the public criticized as "draconian", unfair, contrary to the Rule of Law and so on. (Recent legislation in health, environment and financial matters have given government broader powers to act quickly.) These observations and illustrations should convince the reader that serious harm to the public can easily result, in financial matters, or, more seriously, in health and public safety matters, where legislation is not based on an understanding about how procedural rules can be manipulated. Incompetent or dishonest operators of essential services can defraud or harm the public with virtual impunity. The statutory safeguards originally designed to protect businessmen from bureaucrats now shield operators from proper enforcement. The bureaucrat, whose job is to protect the public, is helpless.



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The right to a hearing, designed to protect licensees from abuse of power, becomes itself a source of substantive injustice simply through the operation of delay; a delay by which the licensee can contribute.

I now propose four recommendations which may help improve the quality of legislation.

### 8.13.6 RECOMMENDATIONS

**First**, the quality of the mandating legislation can be improved with wider circulation of proposed bills in appropriate cases, consultation with agencies, particularly the Council, and by recruiting greater expertise on drafting teams to ensure that both policy and wording issues are dealt with adequately.

**Second**, while there is no solution to a badly drafted statute other than amendment, there are some things that can be done to minimize or to fill in some gaps which can occur in the legislative scheme. This means that greater regulation making power must be given to agencies to “fill in the blanks” of their mandate. Agencies can be given power to issue guidelines and policy statements and to make rules.

**Third**, it may be possible to reduce needless duplication and inconsistencies in legislation by conducting a systematic and thorough review of existing mandating legislation. The Council could coordinate the efforts of agency and ministry counsel to produce in 24 months, a comprehensive legislative package, in the form of an omnibus bill, which would bring uniformity, where uniformity is appropriate, and diversity where diversity is appropriate, to the mandating legislation of all 91 agencies.

**Fourth**, every statute creating an agency should have a provision requiring the courts to give a broad and liberal interpretation to the powers and process of the agency. I have provided such an omnibus clause in the amendments to the *SPPA*.

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## 8.14 CHALLENGING DECISIONS

In this part of the chapter, I shall discuss ways in which persons aggrieved by agencies can seek redress and ways in which decisions made by agencies can be challenged or altered. I shall limit my discussion to legal recourses. Political avenues of redress (with the exception of petitions to cabinet) are beyond the scope of this Report. Nor shall I discuss the recourses available through other agencies of government such as the Ombudsman, the Freedom of Information Commissioner, Human Rights Commissioner, and so on, also available to a party as appropriate. I shall discuss ways in which agencies themselves can act to remedy errors by conducting reviews and rehearings. I shall describe cabinet petitions and appeals to the courts. Lastly, I shall describe judicial review.

### 8.14.1 REVIEW AND REHEAR

In some statutes, provision is made for reviews and rehearings of agency decisions by the agency itself on its own initiative or on the application of a party. (At present some agencies have no such power, which I recommend be remedied). For example, section 42 of the *Ontario Municipal Board Act*, R.S.O. 1980 c. 347, provides:

“The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.”

The review and rehear power is one of the ways that agencies differ from courts of law. Once a court has decided a matter, it cannot rehear it. The recourse is appeal. Agencies have the power to rehear or to review their own decisions for two reasons.

**First**, there is no appeal as a right from agency decisions. An appeal will lie from an agency decision only if specified by statute. An appeal, where permitted, may not extend to questions of fact, but is limited to issues of law and jurisdiction unless otherwise provided. This means that agencies need an expeditious informal way to rectify errors which they have made.

**Second**, agencies must be flexible. They must respond to changes in the sector or activity which is the subject of their mandate. The courts deal with matters that have crystallized.

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Some agencies deal with ongoing issues and matters. They act prospectively while courts act retrospectively. The specific provision permitting a review or rehearing must be interpreted carefully. The scope of the rehearing may be limited to the situation where new facts have emerged since the previous hearing or where facts which could not have been determined at the time of the original hearing have been discovered. The word “rehearing” may mean a fresh start. The word “review” or “reconsideration” may mean that the agency should hear only portions of evidence or argument.

What if there is no express power to rehear? In limited circumstances, agencies have power to review or rehear matters in the absence of a statutory provision. The most common is the situation where there is a clear clerical error contained in the decision. In some cases fraud may be to rehear. Judicial interpretation of implicit agency rehearing powers are constrained by the tendency of judges to apply judicial and court-like values to agency review of agency decisions. The regulatory or legislative nature of agencies and their need to respond to ongoing or changing circumstances has not been fully appreciated by the courts.

In Chapter Nine, I have recommended, for the reasons stated there, that all agencies should possess the statutory power to review and to rehear.

## 8.14.2 CABINET PETITIONS

With Cabinet petitions the line between legal recourse and political recourse becomes blurred. Anybody can ask the Cabinet to do anything. It is not necessary to spell that out in legislation. However, where a right to petition the Cabinet has been created by statute, there is a legal duty in the Cabinet to consider the petition. See *A.G. Canada v. Inuit Tapirisat of Canada* [1980] 2 S.C.R.735. See also my discussion of Petitions in Chapter Nine. The petition is not an appeal. The two words and the two recourses should not be confused. Appeals, where permitted by statute, are almost always to the courts, based on a record, based on a statute, and are bound by rules of procedure and natural justice. A petition, on the other hand, is not limited to the facts or a record. The Cabinet in effect legislates. The purpose of the petition is to permit the Cabinet to substitute its decision for the decision of the agency.

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In substituting its decision, the Cabinet is not in my opinion completely free to do as it wishes, although the *Inuit Tapirisat* decision seems to suggest otherwise. The Cabinet, in my view, is bound by the mandate of the agency; that is, the Cabinet can substitute its own decision for the decision made by the agency, only if the decision is one which the agency had authority to make under its statute.

A Cabinet petition permitted under a statute must not be confused with the exercise of the Crown prerogative by the Cabinet. The Crown prerogative applies only in limited circumstances. See *Operation Dismantle Inc. v The Queen* [1985] 1 S.C.R. 441. See also the discussion in Macaulay, *Practice and Procedure before Administrative Tribunals*, p. 286.

The scope of the Cabinet's power under the *Ontario Municipal Board Act* was discussed by the Ontario Court of Appeal in the Re: *Davisville Investment Co. Ltd.* and *City of Toronto* (1977) 15 O.R. (2d) 553 at p.555:

“The Lieutenant Governor in Council, answerable to the Legislature, exercises a discretionary power of control over the Municipal Board, and is not confined to the grounds stated in the petition or limited to the record before the Board. The petition does not constitute a judicial appeal or review. It merely provides a mechanism for a control by the executive branch of the Government applying its perception of the public interest to the facts established by the Board, plus the additional facts before the [Cabinet]. The... [Cabinet]...can substitute its opinion on a matter of public convenience and general policy in the public interest.”

The case leaves two important questions unanswered.

**First**, are Cabinet petitions subject to court review and if so to what extent? The *Davisville*, *Inuit Tapirisat* and *Operation Dismantle* cases suggest the following propositions. A court can review a Cabinet decision if the Cabinet does not stay within the statute, if the Cabinet refuses to consider the petition or if the Cabinet fails to act within the “dictates of the Charter” (*Operation Dismantle*). However, the Cabinet is not bound by the record of the agency, and has no need to reach a “fair” decision and or to act openly and fairly unless the agency statute requires it to do so.



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**Second**, who can initiate a petition? The wording of most Ontario statutes state that only a party to agency proceedings has a right to petition the Cabinet. The situation differs at the federal level where the Cabinet may on its own initiative review an agency decision or may receive petitions, from other than the parties (see NAPO case). I have recommended that the Cabinet in Ontario be permitted to review certain agency decisions with respect to regulatory or policy aspects in the public interest on the initiative of the Cabinet. In my view, the inclusion of this power is desirable.

### 8.14.3 APPEALS TO A MINISTER

A few statutes permit an appeal to a minister from a decision of an agency. Usually, the appeal to the minister will be limited to questions of fact or policy and not law.

### 8.14.4 APPEALS TO THE COURTS

There is no appeal as a right to the courts from decisions of agencies. The statute establishing the agency or another applicable statute must provide for an appeal right or none will exist. Moreover, most statutes limit the scope of the appeal if one is allowed. For example, it is rare to permit a party to appeal on questions of fact. An example of appeals on questions of fact appears in the *Ministry of Consumer and Commercial Relations Act*, section 11(5) which provides:

“An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.”

I think that this provision gives power to the courts which they should not possess. See also *Re Coates*.

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In some cases, there is even a right of appeal *de novo*; that is, the court is not bound by the record of the agency and must start afresh. This is, in my opinion, totally inappropriate today. It is too slow and too expensive. The courts have no expertise in the subject matter of most agencies. I have recommended that there be no appeals *de novo* and all appeals to the courts should only be allowed on points of law, and, at that, only with the leave of the court.

#### 8.14.5 JUDICIAL REVIEW

In this part, I shall discuss judicial review as distinct from appeals to the courts. The historical supervisory function performed by the superior courts (and now the Divisional Court) through the use of prerogative writs will be described as well as the changes in the use of the writs brought about by the *Judicial Review Procedure Act* (JRPA). I shall also describe how the courts have exercised their supervisory powers with respect to agency decisions and the attempts by the Legislature to exclude the courts from the agency process by the use (mostly futile) of privative clauses. Lastly, I shall discuss the status of agencies on judicial review applications, particularly their standing before the courts.

#### REVIEW AND APPEAL

I stated above that an appeal from an agency decision lies only if permitted by statute. The appeal may be on issues of fact or law or jurisdiction as specified. Judicial reviews are quite different. A party may have recourse to judicial review whether or not this recourse is set out in the agency's mandating statute. However, the review is more narrow than appeal. Judicial review is limited to questions of law and in particular questions of law categorized rightly or wrongly as questions of "jurisdiction." The question of law which arises most often is whether the agency has legal authority (or jurisdiction) to do what it proposes or has purported to do.

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## PREROGATIVE REMEDIES

As the name suggests, prerogative remedies were originally closely connected with the Crown. There were several types of remedies. See Appendix A in *de Smith Judicial Review of Administrative Action 4th ed.* for a review of the historical development of prerogative writs. The first three are of historical interest. The “writ of prerogative” was used to remove from the courts, a matter in which the Crown had an interest. The “writ of scire facias” was used to rescind Royal charters and franchises. The “writ of ne exeat regno” was used to prohibit a subject from leaving the realm. These writs were of course for the benefit of the Crown as opposed to the individual and have long since fallen into disuse.

Five writs remain in use today, namely, *certiorari*, *prohibition*, *habeas corpus*, *quo warranto*, and *mandamus*. These writs are for the benefit of the individual as opposed to the state. A prerogative remedy can be obtained in the following manner. An applicant must apply to the superior court to show cause as to why a particular writ should be issued by the court. The issuance of a writ is a matter of discretion. The superior court authority to issue writs was derived from the Crown as the natural extension of the authority of the central government. Superior court judges acted in the name of the Crown. In effect, they were the delegates of the Crown for the purposes of administering justice throughout the realm. This function included the duty to oversee and supervise the lesser or inferior tribunals which were usually limited in their authority to specified subject matters, monetary or geographic limits. As agencies evolved, they came under the authority of the superior courts.

The applicant must specify the form of relief sought; that is, the applicant must apply for a particular type of writ to meet the particular facts. The various types of writs are as follows:

### PROHIBITION

The issuance of a writ of *prohibition* is intended to prevent an agency from acting in excess of its jurisdiction before the event has taken place. The effect is to prohibit the agency from making a decision for which it lacks legal authority.

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## CERTIORARI

The writ of *certiorari* acts after the event has taken place. *Certiorari* applies where the problem complained of is an error of law on the face of the record. I shall discuss “error of law on the face of the record” later in this chapter.

## MANDAMUS

*Mandamus* applies to oblige an official to carry out a statutory function. It does not apply where an official has power to exercise discretion. It applies to force an official to carry out a non-discretionary function. The writ is rarely used as most officials exercise some form of discretion.

## QUO WARRANTO

*Quo warranto* is also used infrequently but is available to attack the right of an official to do a certain act. The official may not have legal authority to do what he purports to do. In many jurisdictions this writ has been supplanted by injunctive relief.

## HABEAS CORPUS

*Habeas corpus* is available in cases where someone is wrongfully detained, for example, in immigration matters, or in criminal matters.

A practitioner seeking to assist a client would be obliged to categorize the activity complained about to determine which of the available writs most closely applied. The courts in turn would also struggle to find a recourse for someone clearly aggrieved but whose complaint did not quite fit the available recourses. Because the writs had originated in the judicial setting; that is, in superior court supervision over inferior courts, the writs were limited to the review of judicial or court-like proceedings, as opposed to legislative or administrative functions. *Certiorari* and *prohibition* applied to judicial functions. Thus when the courts were faced with administrative action which to their judgement was clearly “wrong,” the court struggled to categorize the matter as “judicial.” In border line cases, the



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courts categorized matters as “quasi-judicial”. The reader can easily see what inclined the courts to categorize administrative agencies by function. Having categorized a matter as judicial or quasi-judicial, the courts would then go on to set the matter “right” in accordance with their own values (even when the whole manipulation was really a charade).

The subjective nature of this process came to be recognized only recently. The clearest expression is found in the decision of Mr. Justice Reid, in *Hughes Boat Works* (1980) 26 O.R.(2d) 420 at p.427-8, where he stated, in describing the distinction between errors of law and errors of jurisdiction:

“It is, I believe true that the process of characterizing alleged errors as errors of law or errors of jurisdiction is essentially a subjective one...I would thus prefer that the subjective nature of the process be acknowledged and that we attempt to state the considerations that should be borne in mind. Thus rather than simply categorizing elements in the decisions of tribunals as jurisdictional or otherwise, I think we should try to illustrate what will lead a court to interfere or to refrain from interfering with what a tribunal has done or decided notwithstanding a privative clause...I think that what may transmute an error of law in our minds into one of jurisdiction is frequently little more than the conviction that the error is a serious one justifying an intervention.”

The *McRuer Report* made recommendations which led to the simplification of the review process. Instead of having to choose among several writs, three (*certiorari*, *prohibition* and *mandamus*) were combined into one procedure, namely an application for judicial review, which application is to be made to a specialised court, the Divisional Court. (The writ of *quo warranto* was subsumed in the injunctive relief also established under the JRPA. Habeas corpus is governed by the *Habeas Corpus Act*).

The procedure to be used is set out in the *JRPA*. In addition to Ontario, Alberta remains the only other common law province to have enacted legislation simplifying the process. The other provinces maintain the older forms. The major advantage with the Ontario and Alberta system is that the practitioner no longer has to fear miscategorizing the wrong.

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In addition to the prerogative remedies, two remedies are available in equity, namely the injunction and the declaration. Provision is made for these forms of relief in the JRPA.

Injunctions can be *prohibitory*, that is, they may require a party in proceedings to refrain from doing something, or *mandatory*, that is, they may oblige a party to do something. A declaration may be available as original relief to declare a party's statutory rights and to test the validity of administrative decisions, but it carries no real teeth. The issuance of these remedies is a matter for the discretion of the court.

I shall now consider the manner in which the courts have exercised that discretion. In Chapter Four, I traced the development of judicial review from 1945 to the present. The period can be divided into two parts, the period of confrontation and the period of coexistence. As I have discussed, the causes of confrontation can be traced to the response of the courts to the rapid growth of government and an attempt to preserve individual rights in the face of state intervention. Moreover, many of the judges were unfamiliar with the nature and role of agencies and their position in protecting certain aspects of the public interest. This attitude affected the way in which the courts assessed agency action. The history is set out in the decision of Mr. Justice Blair in *Forer* to which I have made reference in Chapter Four.

The following three cases illustrate the extent of judicial intervention, namely, *Jarvis v Associated Medical Services* [1964] S.C.R. 497, *Port Arthur Shipbuilding v Arthurs* [1969] SCR 85 and *Metropolitan Life v International Union of Operating Engineers* [1970] S.C.R. 425. In these cases, the court were quick to overturn decisions of labour boards in sophisticated areas of labour relations law. But a few years later as a better understanding of the role of agencies was reached, the courts began to move away from aggressive intervention. This change marked the end of the period of confrontation and the beginning of the period of coexistence.

Chief Justice Dickson in the case of *New Brunswick Liquor Commission v CUPE* developed the "patently unreasonable" test to determine whether a court should overturn an agency decision. The court would accept an interpretation of law by an agency as long as the interpretation was not patently unreasonable even though the court itself might interpret the law in a different manner. To invoke the remedy of judicial review in whatever form,

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*certiorari* or prohibition, the court was obliged to find an error of law relating to jurisdiction or amounting to an error of law on the face of the record. These grounds, however, as interpreted by the courts are so wide open that nothing is excluded. Dean MacDonald has listed some 28 ways in which an agency can commit an error of jurisdiction. Error of law on the face of the record can be extended to cover almost any decision with which the court disagrees. Given the breadth of discretion, the underlying attitude of the courts, became the determinative factor in judicial review applications. The courts saw what they wanted to see.

Because the review process is so highly subjective, it is clear that what the courts give, they can also take away. In *Re: National Bank of Canada and Retail Clerks International Union* (1984) 9 D.D.L.R. (4th) 10 S.C.C., the CBC case *Syndicate des Employes de Production de Quebec v. C.L.R.B. (CBC)* (1984) 9 D.L.R. (4th) 10 S.C.C. case and in *Blanchard v. Control Data Canada Limited* [1984] 2 S.C.R. 476, the courts held that errors which can be categorized as jurisdictional are subject to review and that the standard to be met by the tribunal is "correctness". The situation can be seen even more graphically in the decision of Chief Justice Dickson in *Fraser and Public Service Staff Relations Board* [1985] 2 S.C.R. 455. He stated: (at p.464)

"A restrained approach to disturbing the decisions of specialized administrative tribunals, particularly in the context of labour relations, is essential if the courts are to respect the intentions and policies of Parliament..."

But later he added: (at p.464-5)

"A reviewing court, ... should not interfere with the decision of a statutory decision-maker in a case such as this unless the statutory decision-maker makes a mistake of law, such as addressing his or her mind to the wrong question, applying the wrong principle, failing to apply a principle he or she should have applied, or incorrectly applying a legal principle."

This latter statement shows that the courts will not readily divest themselves of the right to review.

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## 8.14.6 JUDICIAL DEFERENCE

I shall now discuss the way in which legislatures sought to restrict court intervention in agency matters (unsuccessfully in my view!).

In an attempt to put a brake upon interference by the courts, the legislatures enacted “finality” or “privative” clauses. These clauses were intended to prevent the courts from intervening.

A typical privative clause would provide:

“The tribunal has exclusive jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, and, except as otherwise provided in this Act, the action or decision of the Tribunal therein is final and binding for all purposes...”

The courts responded by reviewing decisions of agencies under the guise of examining jurisdictional issues. The courts could and did easily find ways to categorize matters so as to avoid the effects of the privative clauses. The courts have always reserved to themselves the right to review questions of jurisdiction as part of their traditional supervisory role, irrespective of any privative or finality clause.

In *CUPE*, the presence of a privative clause did little to limit court scrutiny. However, the court itself chose to exercise its discretion in a manner which granted status to agencies. Agencies could now be “wrong” but only if such “wrong” was not patently unreasonable. The point is that it was the courts and not the legislature which decided up on the policy of deference.

But there is no guarantee that the policy of deference or coexistence will prevail. The Charter of Rights and Freedoms posits an activist and interventionist role for the courts in a variety of matters. The Fraser decision suggests that the courts have not given up on confrontation. In my opinion, any attempt to restrict the courts by privative or finality



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clauses is futile. Ultimately only the courts themselves can exercise restraint. In my opinion, the approach of the Canada Law Reform Commission is preferable. In Report 26, *Independent Administrative Agencies*, at p.42, the Commission stated:

“We believe that the repeal of privative clauses, or the failure to include one in a new statute, would not be interpreted by courts as a signal for more judicial review. Having said that, if Parliament were concerned about such an effect, whether general in scope or in relation to particular agencies, we think it would be preferable, rather than retaining the technical and obscure language of contemporary privative clauses, to require clearly in legislation that courts show reasonable deference to agency expertise. At the very least, the parliamentary policy with regard to judicial review should be expressed in plain language...”

My only reservation is that there are no words plain enough to preclude the courts unless the courts wish to preclude themselves. I prefer that the courts understand that it would be helpful to reassess the basis of what is known as “curial deference.”

- Let’s look at the whole Act and the spirit of the enactment. Let’s make it work.
- Let’s hear the agency, live, as to its process and hear from it how it carries out its mandate.
- Let’s look at the effect on the public interest of the alternatives of the decision.
- Let’s hear from the agencies on the grounds that they are specialized and they may need to do things differently.

There are a number of ways in which I believe that the Legislature can get its message across to the courts.

**First**, legislatures can enact rules to guide agencies in their procedure. The courts will be reluctant to overturn a procedure for lack of “fairness” (in court-like terms) where the

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legislature has clearly authorised an agency to proceed in a particular manner.

**Second**, legislatures can give agencies wider powers particularly to deal with matters where the agency is required to act in a legislative, administrative or regulatory capacity. However, these steps will not stop judicial intervention. Indeed, the complete exclusion of the courts would not be desirable, but these steps may have the effect of obliging courts to limit their reviews to Charter and other substantive matters. At the very least, agencies should not be subject to review merely because they do not perform in “court-like” ways.

**Third**, I believe that the amended *SPPA* should include a provision stating that the courts are expected to exercise judicial deference towards decisions of “administrative agencies”. I realize that it may be argued that the Legislature may not direct how the courts will treat a matter before them, but I believe that if the courts realize that the Legislature wishes the courts to exercise judicial restraint, that they would do so where they could.

I hope that we have learned something from our experience of the last forty years. As I pointed out in Chapter Four, now is the time for us to move to a better understanding of administrative law. If the courts have a clearer understanding of both the intention of the legislature and the underlying principles on which that intention is based, the courts are far more likely to let agencies get on with what the Legislature has entrusted to them. Thus I propose an amendment to the *SPPA* as follows:

**49(1) The agency has jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, unless such determination is patently unreasonable, or unless the process whereby the agency makes its determination is not provided for by its mandating statute, or is manifestly unfair.**

I will be the first to state that such a provision will be as useless as all the other privative or finality clauses unless the courts are prepared to accept the spirit as well as the letter of the legislation.

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Therefore, I would add a requirement which would oblige courts to be aware of and consider extrinsic aids to the workable and practical interpretation of an agency's monitoring legislation. I propose the following sections:

**49(2) In determining whether a decision of an agency is patently unreasonable or manifestly unfair, the court shall consider,**

- i) the purpose served by the agency;**
- ii) the social, economic and other policies administered by the agency;**
- iii) the legislative history of the statutory or other instrument establishing the agency;**
- iv) the effect on the policies and programs administered by the agency of alternate interpretations of the agency's mandating legislation.**

#### **8.14.7 CONDUCT OF AGENCIES ON REVIEW**

The courts have imposed constraints on agencies seeking status to appear and to defend their decisions on review. Agencies have been unable to appear on reviews on the basis that an inferior court has no standing to justify its decision or conduct.

In my view, this rule should not apply to agencies. In an appeal from a lower court decision, the superior or appellate court has a record of the proceedings below, has familiarity with the procedure and rules of the lower court and may even number among the members of its bench, judges who have had experience at the lower court level. Furthermore all judges are lawyers, and all lawyers are taught the practice and procedures of the lower, and indeed all courts. However, most lawyers are not familiar with the process and procedures of agencies, nor are most judges. Most important of all, judges do not monitor their decisions and in most cases are not directly concerned with the effect of their decisions upon the public interest, whereas agencies are deeply concerned about what happens to one of their decisions because of the continuing public interest. The court ought to hear from agencies about the procedures and the ramifications of a decision. Many times when a matter comes before a court from an agency, there are a number of alternative courses to take. The court

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ought to review these with the agency, if the agency seeks the opportunity before the court to do so.

In my opinion, the failure of the courts to give agencies status to explain their mandate, role, procedures and process is unfortunate.

In *C.L.R.B. and Transair Ltd.* [1977] 1 S.C.R. 722 Mr. Justice Spence stated; (at p.709)

“The issue of whether or not a Board has acted in accordance with the principles of natural justice is surely not a matter upon which the board, whose exercise of its functions is under attack, should debate, in appeal, as a protagonist and that issue should be fought out before the appellate or reviewing Court by the parties and not by the tribunal whose actions are under review...such a proceeding would not indicate the impartiality of the Board or emphasize its dignity.”

In *Northwestern Utilities* [1979] 1 S.C.R. 684 Mr. Justice Estey stated; (at p.709)

“It has been the policy of this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction.”

As we have seen the “jurisdictional” question can be broad indeed. On this basis the Ontario courts have shown greater sensitivity than the SCC. The Ontario Court of Appeal in *Consolidated Bathurst* gave standing to the Ontario Labour Relations Board, but the Board has long enjoyed that courtesy.

What then should be done?

**First**, agencies should be granted status to intervene to make representations in both appeals and reviews on issues of jurisdiction and procedure and other questions of law. I remind the reader of section 9(4) of the *Judicial Review Procedure Act* which states:

“Notice of application for judicial review shall be served upon the Attorney General who is entitled as of right to be heard in person or by counsel on the application.”



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The reason for this is to ensure that the Attorney General as Law Officer to the Crown is made aware of any matter relating to the administration of justice and is empowered to intervene in the interests of justice. There is no reason why this policy could not be extended to permit an agency to intervene on reviews and on appeals to explain to a court the practice and procedure of the agency, the social, economic and other considerations which can be seriously affected by the decision. Quite clearly when a court is faced with a choice of interpretations, and there are frequently at least two, the various effects which can result from this alternative or that ought to be made very clear to the court. None of that is possible if the agency is not entitled to attend. This is particularly important where the subject matter requires expert scientific or other special knowledge; expertise which is quite properly not found on the bench. The courts are equipped to deal with questions of law, but when a scientific or economic question is to be determined, even if the question is clothed in legal arguments, the courts need expert assistance. Thus I would propose a section as follows:

**49(3) The agency is entitled to be heard by counsel on any review or appeal under this Act and may make submissions to the court respecting the jurisdiction, policies and nature of the activities regulated by the agency for the guidance of the court.**

**Second**, as an interim step, agencies should include in any decision a complete statement of the role and mandate of the agency and a description of agency process and procedure so that a reviewing court can get some idea from the decision about the work of the agency. Even so, this will not help the court understand the effect of various alternative ways to look at the decision. The effect on the public interest can be extremely significant, and although the effect of a decision and the impact upon the public interest has not traditionally been of concern to the courts, certainly it is of major concern to agencies and their mandate.

## **8.148 AGENCIES AND THE CHARTER**

On this subject, I commend to the reader the materials contained in the Law Society of Upper Canada Continuing Education Program entitled *The Charter and the Tribunals*

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(November, 1988) and an article by J.M. Evans, entitled, *Administrative Tribunals and Charter Challenges*, (1988) 2 C.J.A.L.P. 14

It seems to me that although the law in this area is developing rapidly, at least five propositions have begun to emerge.

**First**, section 7 of the Charter, which protects “life, liberty and the security of the person,” will reinforce and quite possibly extend (depending on the interpretation given to the words), “...in accordance with the principles of fundamental justice...”, the common law protection afforded to parties to agency proceedings.

**Second**, the Charter may also reinforce the independence, or as I prefer to state it, the arm’s length relationship between agencies and the executive. See *Sethi v. Canada (Minister of Employment and Immigration)*. (1988) 3, Admin. L.R. 108, and 123.

**Third**, agencies empowered to determine questions of law have a duty to refuse to give force and effect to laws which are inconsistent with the provisions of the Constitution. Section 52(1) of the Constitution Act states:

“The Constitution Act of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

The Supreme Court of Canada in *R v Big M Drug Mart Limited* (1985) 18 D.L.R. (4th) 321 stated: (at p.367)

“If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effect of the Constitution Act, 1982, section 52(1) is to give the court not only the power, but the duty, to regard the inconsistent statute, to the extent of the inconsistency, as being no longer of force or effect.”

**Fourth**, some agencies, which can be considered to be “courts of competent jurisdiction”, may fashion remedies for infringement or denial of the Charter rights or freedoms.

Section 24(1) of the Charter states:

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“Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

Are agencies “courts of competent jurisdiction” for the purposes of Section 24(1)?

In *Cuddy Chicks Ltd. v Ontario Labour Relations Board* (1989) 66 O.R. (2nd) 284, the Divisional Court held that Section 52(1) permits “...tribunals other than courts to determine the validity of constituent instruments.” In *Cuddy Chicks*, the OLRB ruled that it had jurisdiction to determine whether workers’ freedom of association were violated by Section 2(b) of the *Labour Relations Act*, R.S.O.1980, c.228 as amended. Section 2(b) purported to exclude agricultural workers from the protection of the *Labour Relations Act*.

The Court first asked whether the agency was empowered by its mandating statute to determine questions of law. The Ontario Labour Relations Board is so empowered under s. 106 of the *Labour Relations Act*.

The second requirement was to determine whether the agency has jurisdiction over the subject matter of the dispute (in *Cuddy Chicks*, the subject matter was an application for certification) and over the parties to the dispute (in *Cuddy Chicks*, the parties were employer and employees).

The Divisional Court in *Cuddy Chicks* said, (at p.292)

“...the O.L.R.B. had a duty to determine the applicability of the Charter so far as jurisdiction is concerned. It is not making a reviewable determination of constitutionality or a declaration but is making a ruling as to its jurisdiction to entertain the matter before it, subject of course, to judicial review.”

But *Cuddy Chicks* should not be taken too far. As L. Taman cautions in his comment on *Cuddy Chicks* in *Jurisdiction of Administrative Tribunals to Consider Charter Arguments* (Law Society of Upper Canada - Symposium on The Charter and Tribunals):

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“There may be a point at which the Board’s expertise is no longer relevant enough to the Charter issue to justify their consideration of it.”

*Cuddy Chicks* has since gone on to appeal.

**Fifth**, the policy of “judicial deference” does not apply in Charter matters.

In *SEIU Local 204 and Broadway Manor Nursing Home* 1985 48 OR (2nd) 225, the Court of Appeal held that an agency in interpreting the Charter is not entitled to judicial deference. The agency must be correct in law; that is, the agency must give the interpretation a court would give.

This holding is based on two grounds. It is the courts which are uniquely qualified to interpret the Charter, and there must be consistency in Charter interpretation.

## DAMAGES UNDER THE CHARTER

Section 24 gives the courts of competent jurisdiction broad authority to remedy a denial or infringement of rights guaranteed under the Charter. The remedies, in practice, will be limited by:

- (i) the extent of the power of the court or tribunal from which relief is sought;
- (ii) limits which are “appropriate and just within the circumstances.”

Where relief is sought from a superior court, available relief includes declaratory or injunctive relief, or damages.

Damages have long been available as a form of relief. See, for example, *Roncarelli v Duplessis* [1959] S.C.R. 121. Section 24 of the Charter could enable a court of competent jurisdiction to award damages against an agency or a member of an agency if, for example, the agency or agency member had failed to adhere to “the principles of fundamental justice” (section 7) in depriving a party of “security of the person.”



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I discuss the question of damages in Chapter Nine and the extent to which an agency and its members can be protected from claims.

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## 8.15 A COORDINATING BODY FOR ADMINISTRATIVE AGENCIES (THE COUNCIL)

### AN OVERVIEW

In many places in this Report, I have proposed the need to create a coordinating body for administrative agencies. I have pointed out the corner-stones of a sound and well functioning agency delivery system in Ontario.

- an authorized Coordinating Body to coordinate for 91 agencies what 20 different ministries cannot possibly coordinate;
- a sound policy of appointments, salaries, reappointments and tenure;
- well organized training programs for new and incumbent members alike, and
- the necessary authority and resourcing.

I have explained why there is a real and important need for a coordinating body. In this section, I shall summarize the major grounds to support the creation of such a body by the Government then move on to describe its proposed functions and structure.

A fundamental weakness of the agency delivery system in Ontario results from a lack of coordination of the performance and product of the 91 agencies. I mean no disrespect, but it is impossible for 91 separate agencies to bring about an improvement in performance and standards of all of the agencies, working through 20 different Ministries. I would like to make it clear that to me coordination means to bring into common action, to harmonize and to act in a smooth concerted fashion. I do not mean by coordinate, to regiment and interfere. This will become obvious when the reader has reviewed the powers which I propose for the coordinating body.

I believe that the public is entitled to have some understanding of how all agencies operate and what to expect of them, even where their mandates differ materially. Some common patterns ought to be established, not only for the public but also for agents and counsel. It

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also ought to be easier for “first-time” applicants or for that matter, all applicants, to have some perspective on how their concerns will be dealt with before all agencies. Where differing mandates necessitate procedures which depart from the norm, there should be differences. However, about 70% of all hearings are similar and ought to be coordinated for the convenience of public participation.

What many agency members and many bureaucrats do not appreciate is that while some agencies are well provided for, many agencies are not. The Ministerial treatment of agencies ranges significantly, from neglect to paternalism, from pride of performance to antipathy, and from total independence to total dependence.

There simply is no coordination of performance of the 91 agencies in Ontario. Many major jurisdictions have studied the need for coordination and how to accomplish it, in order to improve the quality of the administrative agency delivery system- Australia, the USA, France and England are a few. Each jurisdiction has come up with solutions quite similar to those I propose for Ontario. I have also reviewed the Report of Professor Ouellette, which he prepared in 1987 to present to the Quebec Legislature.

One might ask, how does the lack of coordination manifest itself in Ontario, and how would coordination improve the performance of Ontario agencies? Without much elaboration, allow me to remind the reader of 10 important consequences of a lack of coordination.

## **THE EVIDENCE OF NO COORDINATION**

1. There are 91 “regulatory” agencies in Ontario, and although no agency is supposed to develop rules of procedure without referring their rules to the *SPPA* Rules Committee, only four agencies have done so in the last few years. About 84 of the agencies are operating with very old rules or with rules that have never been presented to the Rules Committee. In 18 years, only about 11 agencies have presented their rules to the Committee for its consideration.

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I do not think that it is necessary to reargue the need for rules if only to protect the public interest and to give the public confidence in the even-handed procedures of administrative agencies. Nor is it useful to answer again the argument that all agencies differ and therefore all rules will differ. It is what the agencies have in common, in which the public ought to have confidence.

There exist no generally accepted rules, despite the attempted judicialization by the *SPPA*, because there is no coordination of agency performance and no teeth in the authority of the Rules Committee. A Council could be the central vehicle by which there could be a coordination of agency rules of procedure. Such rules need not be inflexible. They can recognize the difference in agency mandates and could be published in a simple, clean form that the public, and those making use of the agency system could understand without engaging a consultant.

2. A second form of evidence of the lack of coordination in Ontario, is that there is no centralized training process, and there never will be, until there is a central body that can offer this necessary training. There are about 350 new agency members each year, and another 850 incumbent members to keep updated and to help improve their essential skills. It is impossible for any one Ministry out of the 20, or even 20 of them together, to create and conduct training courses for 91 agencies.

Regardless of how well qualified candidates may be in their speciality when appointed, 99% have insufficient experience or knowledge of the operations of government and almost no way of getting up to speed quickly or staying up to speed as time passes.

Until something like the Council is put in place, there is not going to be any coordinated training done among the 91 agencies. Several agencies are now trying to fill this void for themselves but the training ought to be offered and carried out so that all agencies can participate. There is no point in pretending that the agencies can easily do this for themselves across the board.



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3. Until there is some coordination, the Legislative Committee system for agencies will not work nearly as well as it could. There is no Committee system that can usefully review 91 agencies in one session or even one legislature. (20 per session is an inconceivably large number of agencies for a Committee to review in a meaningful way so that the Legislature, the Committee, the Ministry or the Agency get anything out of the review.) However, the agencies could be reviewed by the new Legislative Agency Committee, which I have recommended. The Council could assist the Committee to prepare for reviews and standardize the process so that it will be more useful and expeditious. The Committee on Agencies could communicate with all 91 agencies through the Council to make the work of the Committee more effective. The Ministries would still be informed without encumbering them with the details of this kind of review. Comments upon the Parliamentary Committee system everywhere indicate that the Committee system for agency monitoring and review is not a success. In Ontario, it has not worked well for the reasons which I have pointed out in this Chapter. I believe that with the two step change of creating a new Legislative Agency Committee and the Council, regular reviews of agencies through this legislative means could be very effective.
  4. Because there is no coordination of agency performance in Ontario, there are no general criteria by which anyone can measure the performance of either an agency or a member of an agency. Sooner or later in this Province, we will see introduced remuneration and reappointments which will be based on capability and performance. Even now reappointments ought to rest upon competence and performance. There is no way that fair performance standards can be developed for 91 agencies without coordination, and there is no way we are going to encourage improvement in performance unless and until we introduce some methods of measuring it.

We ought to reward and retain the best, and one has to have broad, acceptable measurement standards to do that. There is such a system for senior bureaucrats. They have measurement standards, a description of which is attached as Appendix 8-3. This kind of measurement should be adapted for the 91 agencies, but it can only be done with coordination. Measurement criteria and some method of monitoring and evaluating are needed. The Council could take a lead in this matter with the support of

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Management Board and the Office for Executive Resources. Such a program cannot be introduced overnight, but it is worthwhile and a start ought to be made now.

5. Until there is coordination, there can be no common policy on public information, be it in French or English. There are in the Province all kinds of policies and programs of public information. They ought to be coordinated, both to improve their quality and to get a better financial return on the money being invested by the Government.

Every agency has some kind of an annual report and public participation material. The cost of the published agency material is substantial. The Council could assist in the coordination of the production. Likely I am the only person in this Province who has taken it upon himself to read every piece of public material that every agency has put out in the last 20 months, but I can assure the reader that it can be measured in the tons. Some of this material is excellent and some of it is dreadful. I believe that we could do a better job from the public's point of view and a whole lot cheaper with some coordination.

6. There is the most alarming misunderstanding of why agencies exist, how they operate and what can be expected of them by the public, the courts, the media, the legal profession, bureaucrats, academics and the agency members themselves. Until there is a coordination of public information and education concerning agencies, the performance of agencies and the expectations of the public will remain well below proper standards of acceptance. There simply is no vehicle through which information and education can be coordinated or made possible. The Council could and should undertake a study of this problem.

Misconception of the delivery system of administrative agencies is as unfortunate as it is obvious. A major contribution which the Council could make in the field of information and education is to assist this immense audience to see and understand the agency system as a whole, and as a major player in the structure of government, rather than as a series of unrelated entities.

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7. It is impossible to create new methods of hearing procedures or provide cheaper and faster conflict resolution without a role model and coordination. There is not one single avenue of development that holds greater promise than Alternative Dispute Resolution procedures and case management. I made a detailed study of these procedures when I was Chair of the OEB. We began introducing the processes about the time I resigned from the Board, but I know from personal experience that dozens of agencies in the USA successfully handle case loads far greater than ours with less cost and I believe greater public acceptance. The newest techniques of conciliation, mediation, arbitration, settlement conferences, generic conferences, policy and “rate making” coupled with well supervised case management are the key to the future for agency hearings in this Province. The Council is the ideal role model to move on this important departure from the past.
  8. There is a need for some research in the field of administrative decision-making and the law that surrounds it. There is no agency in Ontario equipped or in a position to offer leadership to the other agencies in the field of study and research. It would involve the creation of a central reference library of court and agency decisions, and the preparation from time to time of papers and study on matters relative to administrative procedures which could be helpful to all agencies and all Ministries. Some agencies have a small reference library, but most have none. Most agencies have no resources upon which to draw. Agency members who do not read to expand their knowledge will ultimately be a liability to both the agency and the Government. Patently one good reference library that is well used by all agencies is far more cost effective than 91 agencies possessing 91 understocked libraries which are only used part-time. The Council can create a thoughtful centre for study, information and backup. Absolutely nothing exists at the moment.
  9. There is no centralization of resources or exchange of information and advice. Not five agencies are equipped or ready as of the Fall of 1989 to conduct hearings in French. With great respect, the Ministries can not really help the agencies when the Francophone Office disappears. There must be some coordination. The courts will not accept, in my opinion, different standards of hearings from different agencies. There is
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going to be a serious and expensive testing of the French Language Services Legislation in the courts. In the Winter of 1988, the Francophone Office published French Hearing Guidelines for “Tribunals”, that do not meet the requirements of the administrative agencies which may have to hold hearings in French and English. We should be able to share the facilities, resources and people which the *French Language Services Act* will demand. To share, someone has to assemble and coordinate. The Council could and should do this coordination. There are many resources that most agencies do not possess which could be provided through a Council on a shared basis to achieve cost-effectiveness. The sharing of hearing rooms, equipment and even staff is a cost-saving process that has never been tried in Ontario. Most agency hearing rooms are in use less than 50% of the year, which means that there could be a substantial savings by coordinating these and other resources.

10. The matter of criteria for appointments, a procedure for reappointments, salary ranges and benefits and the terms of appointment of agencies range all over the map. There needs to be an apparent theme and direction in these matters. Every Ministry and every agency has its own view of what these matters should be, so might I add does the public, and a number of influential public bodies such as Law Reform Commissions, The Canadian Bar Association and a number of other important organizations. The view of some of these organizations concerning the way in which these matters are handled is not at all flattering. Some of the problems, as I have discussed, stem from a lack of knowledge of how and what is done.

I believe that the Council could be an important consultative resource for the Government and Management Board on performance and financial matters, and for the Attorney General in terms of agency leadership relative to the legal and equity side of the agency system.

These then are 10 arguable justifications for the creation of a coordinating body which I call, *The Ontario Council for Administrative Agencies* (OCAA). Having set forth why there should be coordination and its advantages, I would now like to turn to the recommendation dealing with the creation of such a Council. In discussing the creation of the Council I would like to offer two cautionary but important observations.



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- (i) There is more than one form which a coordinating body could take, other than the OCAA recommended. However, it is the easiest to identify, the most commonly used and the most efficient structure which I have seen tried in a number of jurisdictions.
  - (ii) A coordinating body would in no way diminish or interfere with existing relationships. Existing accountability and relationships would stay the same. The Council, if that is the form the body takes, will have its duties set out later in this Chapter. These duties would bring to the agencies as a whole, performance enhancements, which neither the agencies or the ministries can bring about on their own.

### 8.15.1 ONTARIO COUNCIL FOR ADMINISTRATIVE AGENCIES (OCAA)

There is, as I have stated several times in this Report, in existence, in Ontario, the *SPPA* which was enacted in 1971 following the Report of Chief Justice McRuer. That Report was commissioned, not as part of the development of administrative practice and procedure in Ontario, but rather as a response by the Government of the day to a politically volatile situation following the introduction of a new Police Bill into the legislature in 1963-64.

The *SPPA* created what was called the Statutory Powers Procedure Rules Committee. The *SPPA* provides that no rules of an agency to which Part I of the *SPPA* applies shall be put into use unless the Committee is consulted. No one knows how many agencies are governed by Part I of *SPPA*. I have no quarrel with the existence of the Rules Committee, and in fact strongly believe in the coordination of the agency rules. I recommend that the Committee continue but in a reorganized form to carry out a number of other tasks as well, that would be involved in the coordination of the agency delivery system in Ontario.

On June 23, 1989 I personally reviewed the minute books of the SPPRC and what I saw there confirmed my earlier views. From 1976 to 1982 the SPPRC reviewed the rules of 6 agencies, namely SARB, CRAT, OLRB, HSAB, ARB, and Residential Premises Rent Review Board.

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The SPPRC reviewed no rules from 1982 to 1987. From 1987 to date the SPPRC has reviewed the Rules of Ontario Telephone Commission, Pay Equity, OEB, EAB, and OMB a total of 11 agencies in 18 years.

The SPPRC appears to have issued one annual report and that in 1976.

But I would not want to suggest that the SPPRC is unaware of the difficulties it has in carrying out its mandate. In the minutes of its meeting of July 22, 1987, the Committee noted that it was concerned about the value and usefulness of the Committee and that realistically it was unable to carry out the task of keeping the rules of agencies under continuous review and even discussed the possibility that its functions would be better performed by a committee or group similar to the United Kingdom Council on Tribunals.

(I have proposed using the word "Council" because it suggests to me, at least, that its composition is diverse and it convenes to consult and recommend, rather than to decide. The word "committee" may have been appropriate for the Rules Committee, but the word "committee" suggests that it is an appendage of some larger body. This Council would not be part of some larger body.)

The Council would be small in composition. Only the Chair would be full-time. The membership would be created from chairs of existing agencies. The other members could be drawn, from the public, the bench, the Law Society, the academia, the senior civil service, the Ministry of the Attorney General and from Management Board.

The Council would have a small staff. The staff should be seconded from the ministries for the first two years, until the Council and the Government have an opportunity to see what resources the Council will require. If the Council is not working out as well as envisaged, the form of the Council can be changed or discarded.

I believe that the budget should be modest relative to the benefits of the cost savings and increased efficiency. This Report recommends ways in which the Government could justify

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raising \$60,000,000 in additional revenue through agency operations; a small amount of which could be allocated to the operations of the Council.

## **REPORTING BY THE COUNCIL**

The Council could account or report to the following:

- The Office of the Premier;
- A new Cabinet Committee on Agencies;
- The Attorney General as the Chief Law Officer;
- The Minister responsible for Management Board;
- The Legislature, or
- A new Ministry of Court and Agency Administration.

I do not recommend that the Council account to either the Speaker or the Legislature as a whole, nor do I propose the creation of new Ministries. The choice comes down to the Office of the Premier, the Attorney-General, Management Board or a Committee of Cabinet on Agencies. A good case can be made for any of the four. Frankly, I do not believe that the detail of the Council requires the regular attention of the Premier's Office. Having sat on many committees of Cabinet, I could not recommend a special Committee for this purpose, because of the broad application of the Council's work. I am of the view that a Council ought to draw its resources and operational directions from Management Board but take its performance direction as to procedure, law and equity from the Attorney General. Both Ministers have a very significant interest in the workings of the Administrative Agencies. The Council's mandate would be set forth in an amendment to the existing *SPPA*. I have

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set forth the proposed amendment at the end of this Chapter. Basically speaking the Council, in the beginning would, except for dealing with Rules of Procedure, be advisory only. I see the Council acting as a role model and an educator, with the duty to obtain as much leadership through consensus and agreement as possible. If in due course, it will become clear that specific powers should be granted, then there will be time enough for the Government to consider additional authority for the Council.

The Council should be located in quarters of its own, wherein there would be several hearing rooms, a library, a reading room and other associated accommodation to provide a beginning for a shared use of facilities.

It will take about a year to get the Council operational and I recommend that the first Chair be appointed full-time for a two year term. If at the end of the second year the Council has not justified its creation, it can be easily and inexpensively terminated, or altered. If the Council is created, it should be scheduled for a Sunset Review two years hence.

The agency chairs would be seconded from their respective agencies. The agencies would continue their salary and benefits. They should initially be appointed to the Council for a two year period, and thereafter they revolve to keep a constant and fresh inflow of representation from different agencies. The agencies to be represented on the Council can be resolved later, but I would propose a mix.

I would recommend for non-government members a remuneration of \$300 a day. These appointments should be for two years to begin with and later turned into one, two and three year appointments in order to create a revolving Council membership. The quorum of the Council should be five, at least three of whom must be the chair of an agency. The Chair would have a casting vote.

The Council should keep minutes with all of its records, reports and filings having the same protection respecting confidentiality offered to agency material.



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I shall begin this section by outlining the specific functions which the Council would carry out. However, it is unreasonable to expect that all of the functions could be completed in the first two years of its mandate. Also, the Council may find other functions to assume.

## TRAINING

I have explained in considerable depth the importance I attach to both introductory and on-going training. Some agencies (two or three) have created general introductory courses which are important for their members. However when one realizes that out of the 1,100 agency members, about 350 may be new each year, one can see the magnitude of the training task. If one has been a chairperson of an agency, one will know the tremendous difficulty of burdening existing members with the teaching obligation. In addition, many outside instructors would be necessary on a sizeable array of specialized topics. Courses to instruct 350 men and women a year would be beyond the capacity of any Ministry or any agency. I should observe in passing that a substantial number of extremely competent men and women in many walks of life have offered to establish and take part in such courses, as a contribution to the betterment of our public service. One should remember that there would be a need for additional courses for some of the other 850 agency members. This too is a substantial undertaking.

The Council would organize a series of courses to be held in its own quarters, where it could control the quality of the training. Hence, the need for one hearing room for almost constant use. These courses would be available for all agency members, as well as any Ministry members to the extent of the capacity of the accommodation. I know as a teacher at the University of Toronto that there are optimum sizes of classes and that time is needed to engage in useful discussion. I am confident that the courses could run all year at a modest instruction cost. I am confident as well that there are a great many potential instructors in the Civil Service who would enjoy, as do I, sharing their enthusiasm for a subject that is in the public service.

To put together such courses, the organizers must have been involved in actual agency operation and management. This is a *sine qua non* in my opinion. The Council would not only be the best source of information and skills, but it can best assess how and when to

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present the material. The courses could commence as early as the winter of 1989. I have set forth in this Chapter under the heading of “Training” the contents of the courses for those interested in studying my proposal.

## **APPOINTMENTS AND REAPPOINTMENTS**

Many commentators upon the administrative agency scene including some lawyers appear to consider the appointment process the fountain of all sound agency performance. The appointment process is important but the best process in the world can produce disappointing results, just as the worst process can produce some fine results.

**First**, it should be realized that there is a difference between the quality of the appointment process and the quality of the appointee. The quality of appointments does not have a necessary relationship with the appointment process.

**Second**, there is no agreement upon what constitutes a good process. Many assume that unless the appointment process is open that it is inferior, if not suspect producing appointees of poor quality. Both of these assumptions are, in my opinion, wrong.

From first hand experience I know that:

(a) A candidate may pass the very best screening, and possess the highest credentials, and yet in real life, once appointed could display any or several of the following characteristics. The candidate could be difficult to deal with, uncooperative, a rude person in handling the public, “right-off-the-wall” in terms of good judgment, impatient, a poor listener, a slow learner, greedy, very hard on the staff, a poor teacher of new members, argumentative, a poor writer, egotistical, unwilling to take courses or learn, a nit-picker, or an elitist, just to mention a few characteristics that are not easily detected during interviews. A good appointee may be found as much by good luck as good management.

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(b) The candidate can develop all kinds of family and health problems which undercut the energy level of the appointee as well as the extent to which the candidate is able to share the work load. When one remembers that the nature of the work may not attract young men and women, the odds are high that family and health problems can create serious difficulties.

(c) Some agencies require very highly trained appointees, and from experience I know that many people have to be sought out. The most open of all processes will not assure a supply of highly skilled people at salaries which have been traditionally available in Canada in the public service. It is not useful to say in reply "then offer more money". Some people in their 30's and 40's with a young family, a mortgage, and a great future in a profession or a corporation, with a large potential retirement pension, are not going to leave that security, for one, two or three year appointments. Appointees often cannot go back and pick-up where they left off (or go back at all).

Then there is the difficulty of selecting people who live about the Province. We certainly do not want only candidates who live close to their work in Toronto. There are tremendous problems of selling the family home, buying another, moving the children from school to school. Thus, while opening up the appointment process, looks to be egalitarian and democratic, I believe that for some agencies, it will not make much if a difference, and could create a tremendous load of work with few tangible benefits.

I would also add that the specialist kind of appointee required in nearly every case will not apply for a position that has been advertised. It all sounds fine in theory but "that isn't how the real world works"! Headhunters exist for a good reason.

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(d) Some agencies do not require highly sophisticated skills and training, but require skills and attributes which we all think we possess but are difficult to define or test, such as character, thoughtfulness, an ability to listen and to write sympathetically, a knowledge of community standards, an ability to travel with little notice and to remain out in the country for days at a time when only a three hour hearing was expected, large helpings of common sense, the wisdom to know what you do not know, and basic people skills. Finding men and women with these attributes can be assisted by advertising and I have recommended a procedure which could be operated through the Council. However, I want to point out that advertising can create even more problems than it solves.

I believe that it is important that there be public confidence in the persons who are appointed to agency membership. Furthermore, there is a belief that an open and public process of appointments will produce a better field from which appointments could be made. At the same time, with our form of government in Canada, where the Government has to take the responsibility for the decisions of agencies, whether it wants to or not, the Government cannot delegate the task of making appointments to agencies to anyone outside of government. Further, the Government cannot put itself in a position where it can do nothing about agency decisions that run counter to the direction of Government policy. These are two major points which many critics ignore, confusing as they do the role of the agencies with the role of the courts.

I believe that the Council could measurably improve the perception of an open appointment procedure by advertising the process and ensuring impartial collection of a list of potential appointees.

#### (a) **ADVERTISING**

The Council could work within the agency system and with the Ministries to develop a description of each agency and the general type of appointees considered suitable. For some agencies, this would be quite a general description and for some agencies relatively specific. Once an agency description was accepted, and vacancies were



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identified, the Council could advertise positions on behalf of the Ministries. There is tremendous public support for advertising vacancies. The Council could advertise generally once a year to build a reference list for Ministries. Interviews, which are time consuming, could be carried out through the Council. I want to stress the importance of agencies having input into the interview system. Yet, I want to caution about getting too enthusiastic about this advertising process for a host of reasons.

The needs of some agencies are very specific and precise. An example may help. The Energy Board usually has a complement of nine men and women who are full-time. Any agency that sits on one case for up to six months can not really make effective use of part-time members for obvious reasons. Of the nine members, the agency requires one or two accountants, one or two engineers, one or two lawyers, one economist, one statistician, a rate specialist, and a financial market analyst. What is needed at any one time will be only one of these specialists if a vacancy arises to retain a balance of the required disciplines. Accordingly, when an opening comes up for the Energy Board the need will be very specific. In addition, the person must be able to move to Toronto for three years or commute back and forth each week. This may sound easy to the critic, however getting the right people, at the right time, for the right money, with all other things being equal, is very difficult, and it won't happen just through advertising.

I believe that the Peterson Government has made important strides to develop good appointees drawn from many walks of life. In an imperfect society, composed of imperfect human beings, there will always be someone ready to condemn an appointment. I believe the appointment process in Ontario is superior to that in the other provinces or at the federal level. Where I think that the Government of Ontario has let itself down is that it has failed to explain the nature and goals of the appointment process which it operates. In my opinion, the system has produced competent men and women appointees, but the assumption is that they are not competent because the appointment process is not self-evident. The government either has to weather the abuse hurled at it or make some concession which may not improve the end quality one bit.

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I recommend the use of advertising as a change in the procedure. The Government then can take credit for a more open system and at the same time remove the criticism about agency members. Yet a further difficulty with advertising in the appointment process is how to describe what the Ministry and the agency are looking for in a candidate when certain colour, race, creed, sex or age are vital considerations. There are agencies that absolutely must contain a balanced membership of many characteristics which one would find either difficult to describe, or if described in advertising would not differentiate one candidate from another.

Another difficulty relates to agricultural agencies (17 out of the 91) where the basic membership requirement is that the appointee be a farmer. Not only must the appointee be a farmer, but a certain type of farmer and from a certain part of the Province. There is a tradition that the Federation of Agriculture may need to be consulted. For such agencies, advertising maybe wasteful and unproductive.

A fourth kind of problem arises where an agency must have representation from the labour movement and industry, or from this profession or that. These are advocacy appointments and presumably the government must accept the nominees offered to it. There would be little point in advertising these positions. In addition, in other cases it is far better to consult the Associations to which some members belong than to advertise.

A fifth kind of problem revolves around an agency which really wants a broad cross-section of people with community interests as the Film Review Board. It is difficult to offer a meaningful description of these vacancies. I have no hesitation in saying that it can be done, but I am not confident that the end product will be better than the end product right now. However, the Council could undertake the first step of helping to create agency descriptions and an inventory of positions in cooperation with the Ministries and agencies involved. This work would have to be done for all agencies to be meaningful, and could only be done with coordination by one body such as the

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Council, which has had a great deal of experience in these matters, knows instinctively what is needed and how to assess the candidates who initially come forward.

Yet another problem with advertising as a solution, is that appointments, of necessity, come up continuously during the year. It would be impossible financially and administratively to advertise pin-point vacancies every day. Even if it were possible, there would be thousands of responses to be weighed, then assessed, after which interviews would follow. The phone calls, letters of reference, correspondence would be overwhelming for the vacancies. A recent vacancy elicited 1,500 responses, most of which were totally unsuitable. Many of those not interviewed wanted investigations conducted alleging discrimination, unfair treatment, etc.

Advertising by a Council for up to 250 positions a year could be far more cost effective and subject to better control and supervision than if conducted by 91 different agencies or 20 Ministries.

#### **(b) IMPARTIAL COLLECTION OF A LIST OF POTENTIAL APPOINTEES**

Obtaining the names and interest of candidates is the smallest part of the job. The real test is to identify a good candidate from a bad one. In my opinion, this can best be done by people who have seen many candidates and know from agency operating experience, what is expected of appointees. The interview may show that a candidate may not be suitable for the position for which he applied, but, that he may be suited to some other position that is or soon will be vacant. The Council would not make the final decision on any appointment, nor need the Council's interviews interfere with any interviews or ultimate decisions to be made by the ministries. What the Council would provide is a public forum for non-political people, including a public member component, to interview and make recommendations to the decision-makers, and thus remove the "political crony" connotation of a closed patronage system.

The next problem to be addressed is what happens if the Government does not want to accept any recommendation that is made to it. I do not think that any Cabinet should

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have to explain to anyone why it did not appoint a particular person. This would paralyse the appointment system and reduce appointees to an auction process and public exposure to which candidates will not want to be exposed.

I mean no disrespect, but if the purpose of an open appointment process means getting away, at least openly, from strong political sponsorship then I do not believe that this can be accomplished through the Legislative Committee system as has been proposed. In addition, in fairness, I should observe that when an agency recently did advertise a number of vacancies, many applicants accompanied their applications with supporting letters by their local MPP. I do not criticize such action. I did it myself many times when I was a Cabinet Minister and a MPP, but it clearly demonstrates that the process does involve politics.

(i) The public itself assumes, if not expects, that the appointment process is, or ought to be, political, and,

(ii) The Members of the Legislature either willingly or under pressure would take part in the process. This surely does not remove the process from the “old political crony” allegation.

Thus for many reasons, if there is to be advertising and a visible and impartial inventory of candidates, it ought to be done by one public body, which can give its full, year-round attention to the task. This can not be done in a coordinated way either by Ministries, Agencies or Committees. Incidentally, there may be those who would like to participate in the work of government through agency membership but have no idea of how they can bring their name to the attention of the government without being accused of being a “political crony”. The Council could constitute a useful reservoir to which these people could make known their interest.

Once the advertising is complete and the interviewing is over the Council could prepare a list of suitable candidates offering a number of choices and assessments. The list could be available both for inspection by the public or the Government. What is so



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vital about the process is that people who want to serve, can make their willingness known, be interviewed, where appropriate, without compromising the Government's responsibility to make the appointments. The interviewing process could be in the name of the Council with the assistance from the Ministries, the agencies and the Premier's Office.

After the list has been prepared, it will constitute the existing inventory of openings and potential appointees, which could be shared with the Ministries and the agencies. The Government would be free to make its own selection. To suggest that the Government must report to the Legislature why it has not selected an appointee proposed to it by one of the Committees or an agency, would cripple the Government process of keeping agencies responsive to the public need.

I further believe that if upon the appointment or reappointment, release was issued by the Premier's Office or the Ministry that such and such a person had been appointed for a position for whatever number of years, and at whatever salary, and setting forth some of the qualities which were found in the appointee, that such would constitute a fair and open appointment procedure in which the public could have confidence.

## **RULES OF PROCEDURE**

Elsewhere in this Report I have discussed the need to have Rules of Procedure for every agency, that they be published in both English and French, and that they be readily available to the public. Agencies should be given a reasonable opportunity to produce a set of rules and present them to the Council for approval, failing which, rules created by the Council would apply until replaced by agency-initiated rules requiring the Council's approval.

When discussing the Rules above in this Chapter, I pointed out that while the present *SPPA* requires consultation with the existing Rules Committee, the Committee has no real power, has insufficient representation from the 91 agencies and very few agencies in the last few years have presented their rules for Committee consideration. Section 26 of the *SPPA*,

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drawn in 1971, is not broad or strong enough. In addition, there is no monitoring of the conduct of the agencies as envisaged by Section 26.

All agencies need not have the same rules, but all agencies ought to have rules and they do not. The function of the Council would include the functions of the present Rules Committee, except that the Council would have some authority to impose rules where none exist, and would have some say in what ought to be included in the common part of the rules to protect the public, including the French/English hearing provisions.

## **PERFORMANCE APPRAISALS**

It is very difficult for Management Board or any Ministry to which an agency accounts, to assess whether the agency is cost-effective and how its performance compares with other agencies. It is also difficult to know how the performance of members compare. I have heard it asserted that comparisons can not be made. With great respect, I know that agency performance can be assessed and so can that of agency members. The Council could assist in creating standards by which cost and performance effectiveness can be compared. If we are ever to determine a real “sunsetting” process, or to evaluate the appointment of members, we have to face the discomfort of the fact that some agencies and some members may not perform well enough. It is then that a second assessment must take place. Despite performance, other factors must be weighed to determine the validity of the agency. But we have to start with some generally acceptable standards of comparison, otherwise we must forsake “value for effort” assessments.

## **REMUNERATION AND TENURE**

Earlier in this Report, I pointed out that the remuneration of agency members was all over the map from \$14 per hour to \$115,000 a year, and often for performing very similar work. Some members are full-time and some are part-time. Some hold office at pleasure, some for one year, some for two, some for three and some for longer. Some never get notice of whether they will be reappointed, and some are advised 10 days after the reappointment has expired. Some members have not been paid for 6

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months and some have no idea of their salary. Some have a memorandum of agreement and some do not, and so forth.

I say this, not by way of criticism, because I believe there are explanations for many of these differences, but rather to point out that there are these differences and many of them could be streamlined and made more consistent. I know that the system of agencies could be greatly simplified and that the Council could assist Management Board by analyzing from inside the system, how it could be more easily coordinated.

For example, should the appointment of full-time members be the same length as part-time members, and what is the rationale if they should differ? Should the tenure vary with certain agencies? The Labour Movement takes a strong position that its nominees are advocate appointments and are not adjudicative appointments. Should an agency like the Energy Board, which can have a tremendous impact upon the provincial economy, and where a substantial amount of experience and training is essential in an appointee, have the same length of tenure as an agency where a reasonable knowledge of community values and common sense are far more important than a lot of sophisticated expertise in a limited area? Should there be transfers between agencies when there are heavy case loads to cut down on delay and reduce the need to appoint more members? Should there be fewer members and make them full-time, or should there be more members and make them part-time? Is it wasteful to have very experienced senior civil servants leave the service at any given age, when their skill could be used as a member of an agency? Could there be transfers between the agencies and the Ministries (perhaps not the accountable Ministry) of senior personnel or agency members?

I think that it is a mistake to believe that we are perfect or that things could not be done better or differently. The outlook of an agency towards itself and other agencies and their mandates is so different from that of a Ministry or Management Board, that I believe that with a well organized Council, we could come up with sound recommendations for Government to bring consistency to salaries, tenure, appointments and reappointments. I am not one that says salaries are too low but they are inconsistent and there ought to be a pattern that relates to the responsibility undertaken, the qualities brought to the job and performance.

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Government policy must prevail in terms of the relationship of members' salaries to the private sector because there is such an abundance of considerations to be borne in mind when making changes or establishing criteria with a civil service of 85,000. I believe that there should be more effort to equate or rationalize the obvious differences. I say this because I believe the Council could be helpful both in acquiring information and selling ideas within the system.

## **CENTRAL SERVICES**

Most agencies hold hearings. Some always hold hearings. Some seldom hold hearings and some never hold hearings. Patently their requirements will differ. Some agencies always sit in Toronto, but 50% of hearings are held outside of Toronto.

Without naming agencies, the hearing rooms of agencies which have their own, stand idle about 50% of the time. Some agencies hold hearings that take so long that they likely cannot share their hearing rooms with others. Yet, I know that if there were some central hearing rooms with associated equipment, reproduction equipment, reading rooms and a library, that there could be a far more efficient use of rent, space, equipment and people than is presently the case. There are other central needs such as a registry for the decisions of all agencies, one central computer to assist agencies which have need of a computer, a need for interpreters and translators as well as the equipment needed to conduct French hearings, and there is a great deal of research that is being done, the benefits of which lie idle because they are not shared. These are but a few of the ways in which a centralized service can serve many and cost less. These services could be developed and controlled by the Council. Shared costs or cost effectiveness are not really possible through 20 Ministries.

## **CONFLICT OF INTEREST**

I will discuss this subject in Chapter Nine. There is a Directive of Management Board on this subject, but it appears that there has been little follow-up or compliance. I believe that this could be a serious matter and that there should be some monitoring of this Directive. This is a task that the Council could well undertake and monitor.



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## **FUNDING AGENCIES AND INTERVENORS**

In the case of some agencies, their costs of operation ought to be borne more by the users of the agencies and less by the Consolidated Revenue Fund. There clearly are agencies which one would call “user friendly” because they deal in matters that greatly benefit the user. Some of these agencies must be financed by the Consolidated Revenue Fund but some or all of the costs of other agencies should be borne by the users. It is not useful to repeat all or any of the material discussed in Chapter Seven or later in Chapter Nine, but I do think that the Council could be very helpful both to the Ministries and the Treasury to discover ways these agencies can place more of the burden on users. I project some \$60,000,000 could be raised from user fees to offset the large \$135,000,000 deficit of operating our agency system.

While I recognize that there are many detractors to intervenor funding, I believe that there will be more rather than less funding required in the future. If this is the course of the future in some matters, it requires supervision and monitoring to determine who gets paid what and under what circumstances. As it stands there are no standards or procedures which can be applied between agencies. I believe that the Council ought to develop these standards and a mechanism for monitoring the process.

### **Public Access to Agencies**

In Chapter Nine, I discuss the need for public access to agencies, as well as agency participation brochures and other material put out by some agencies and not by others. The Reports of agencies are important to many people and organizations, and I believe that a far better job can be done, for a lot less money.

Annual Reports are important documents and can serve many useful purposes. Although it is not necessary that Annual Reports be identical in their presentation, they should provide some basic information which the public is entitled to receive. This could be coordinated better without in any way encroaching upon the prerogatives of the Ministries or the agencies.

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At present some statutes require that some agencies publish an annual report and others do not. Some annual reports are glossy public relations pieces that would compare favourably to Madison Avenue glitz, whereas others are very modest productions. I believe that an annual report of an agency ought not to be mandatory, which is the case for many agencies. Whether or not there should be an annual report should depend as a rule upon the decision of the Ministry in consultation with the agency.

Some agencies believe that annual reports are the only way in which they can inform their constituents of their activities. Some agencies advise that they publish them only because their mandating act requires them to do so. Others do not publish an annual report at all. Some agencies publish the report “in house” while others go outside to publishing houses or printing establishments. Yet, even among those agencies reporting their activities, there is a great variety in the type and quality of information that is published.

I have therefore included in the draft amendment to the *SPPA*, a provision that would amend all mandating legislation respecting annual reports of agencies and permit, rather than require, the agency to publish an annual report. I would like to make it clear, however, that it will take a general amendment and not a directive of Management Board, because the mandating acts cannot be repealed or amended by a directive.

Furthermore, I believe that if the Council is created, it can develop a model method of reporting to the public, the constituents and the Legislature which can save a great deal of time and money and at the same time make available useful and desirable information. I would also remind the reader that I believe that the Council would, amongst its many functions, be of material assistance in arriving at a suggested schedule of agencies that should publish an annual report, as well as an economic publishing procedure.

I would recommend an amendment to the *SPPA* as follows:

**80(1) Notwithstanding any other Act, an agency shall file an annual report upon the affairs of the agency with the Minister responsible for the agency in each fiscal year.**

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**(2) The agency shall make such further reports and provide the minister with such information from time to time as required.**

**(3) Upon the recommendation of the Chairperson of Management Board of Cabinet, the requirement that an agency file an annual report may be waived.**

**(4) The Lieutenant Governor in Council may make regulations regarding the publication, form and content of annual and other reports to be filed under this section.**

Also, I believe that each agency should have a well-designed and informative brochure in both French and English describing to the public what the agency does and how the public can become involved. However, many agencies have no such material, and some of what exists could be substantially improved. A Council could be of great assistance in this enterprise.

## **Conduct Reference Hearings**

Some acts enable the Lieutenant Governor in Council (LGIC) to direct an agency to hold a hearing and to report upon a specific subject. Even where there is such a power, it has been in the past too narrowly drafted, in my opinion. I believe that there can be a general use made of the Council by the Government, from time to time, to look at matters of public concern through the public or private hearing process, particularly in the field of administrative law. This may or may not happen, but if needed it is a task which could be conducted by the Council without having to go outside the agency system.

## **Review of Draft Legislation**

I believe that the Council should provide useful advice during the preparation of draft legislation before it is introduced when a new agency is being contemplated or when amendments to existing legislation are being considered. As I have stated elsewhere in this Report, if there was less secrecy and less pride of authorship concerning the drafting of legislation, and more concern with operational considerations, both from the point of view of those who will actually interpret and implement the legislation, as well as from those

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who will be affected by it, I believe that the Province would be far better served.

I might add that where there are Councils in the world such as I recommend, one of the major functions, successfully assigned to the Council, has been a review of pending administrative legislation. I am confident that the *SPPA* will require changes from time to time. I believe that the Council should be the focus for general legislative change and should concentrate upon general legislative changes which really are not the concern of any specific Ministry or even any one agency.

Traditionally, the first drafting of legislation takes place in the ministry which will sponsor the legislation. This means that there is a certain amount of drafting done at that stage, thereafter many groups and persons get a crack at the drafting and fine tuning. It usually ends up on the desk of the Legislative Counsel before going to Cabinet or back to the Ministry. The truth is that the legislation is not a secret at that stage, and in most cases need not be. What is far more important, and I can say this as a former Minister who drafted and established at least three new Ministries that the legislation when it does emerge, must be clear to those who have to implement it and particularly clear to the courts. To me, that means that legislation would benefit greatly if it was talked over with the people who will interpret and implement it. The objective is not to seek their approval, but to see if they could make some operational and interpretive improvements. In this Report, I have pointed out some absolutely dreadful mistakes in draftsmanship, which could, in my opinion have been caught by the agency that ultimately had to try to implement the legislation. The cost to the taxpayer in these cases has been substantial.

I do not repeat here what I have written elsewhere concerning draftsmanship but it truly is everyone's business. There can be huge hidden public costs which never get assessed because of drafting errors and miscalculations which neither the public nor the Legislature ever hears about. These might be eradicated or reduced, by consultation with people who in fact have had practical agency experience in implementing legislation. In many jurisdictions where a Council has been created (Australia, France, USA, England for example), there is a provision for consulting the Council on legislation which would affect an existing or to-be-created agency. I think it would be valuable if such legislation in Ontario was put to the Council for its comments (but not its approval).



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A draft of an Act to amend the *Statutory Powers Procedure Act* follows as a case in point for comment. The intent is to provide provisions to establish an Ontario Council of Administrative Agencies (OCAA).

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## AN ACT TO AMEND THE STATUTORY POWERS PROCEDURE ACT

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario enacts as follows:

1. Subsection 1(1) of the *Statutory Powers Procedure Act*, being chapter 484 of the *Revised Statutes of Ontario*, 1980 is amended by adding thereto the following:

### Definitions

1. (1) In this Act,

- (a) “agency” means an agency, board, commission or tribunal designated in Schedule I;
- (b) “appointing authority” means the Lieutenant Governor in Council or a member of the Executive Council empowered to appoint the members of an agency;
- (c) “Council” means the Ontario Council for Administrative Agencies;
- (d) “Minister” means the member of the Executive Council appointed by the Lieutenant Governor in Council as the Minister responsible for this Act.

2. The said Act is amended by adding thereto the following Part.

## PART II

### Ontario Council of Administrative Agencies

#### Establishment

2. (1) The Statutory Powers Procedure Rules Committee is continued under the name of the Ontario Council for Administrative Agencies and may be composed of not less than nine members and not more than eleven members including,
  - (a) representatives of the public who are not members of the public service of Ontario;

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- (b) a member of the Law Society of Upper Canada or a judge of the High Court;
- (c) a senior official of the Ministry of the Attorney General;
- (d) a senior official of the Management Board of Cabinet; and
- (e) members chosen from among the chairs of the agencies listed in Schedule I,
- appointed by the Lieutenant Governor in Council.

<b>Members</b>	(2) The members shall serve on a full time or a part time basis as the Lieutenant Governor in Council may determine.
<b>Chair and Vice Chair</b>	(3) The Lieutenant Governor in Council shall appoint the Chair and the Vice Chair of the Council from among the members of the Council.
<b>Term</b>	(4) A member of the Council shall be appointed for a term not more than three years and may be reappointed for a further term or terms.
<b>Absence of Chair</b>	(5) If the Chair of the Council is absent or if there is a vacancy in the office of the Chair of the Council, the Vice Chair shall act as Chair and have all the powers of the Chair.
<b>Vacancies</b>	(6) The Lieutenant Governor in Council may fill any vacancy in the membership of the Council or in the offices of the Chair or Vice Chair.
<b>Remuneration</b>	(7) The members of the Council shall be paid such remuneration and expenses as the Lieutenant Governor in Council may determine.
<b>Continuation of Appointment</b>	(8) A member of the Council who is also a chair or a member of an agency may continue to be the chair or a member of the agency.
<b>Meeting of Council</b>	3. (1) The Council shall hold such meetings as are necessary for the performance of its duties.

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<b>Quorum</b>	(2) A majority of members of the Council and the Chair or Vice Chair constitute a quorum.
<b>Chair to Preside</b>	(3) Subject to subsection 2(5), the Chair shall preside at all meetings of the Council.
<b>Majority Vote</b>	(4) Matters arising at a meeting of the Council shall be determined by a majority of the votes but if there is no majority vote, the vote of the Chair shall govern.
<b>Rules</b>	(5) The Council shall adopt and publish rules respecting the conduct of its meetings and the performance of its duties and functions under this Act.
<b>Chair as Chief Executive Officer</b>	<p>4. (1) The Chair shall be the chief executive officer of the Council and shall exercise the powers and perform the duties that are vested in the Chair by this Act, including but not restricted to, the duty and power to</p> <ul style="list-style-type: none"><li>(a) make inquiries into matters necessary for the work of the Council;</li><li>(b) obtain information necessary for the work of the Council from agencies and other branches and ministries of the government;</li><li>(c) appoint members and others to committees of the Council;</li><li>(d) prepare estimates, budgets, and accounts;</li><li>(e) furnish assistance and advice on matters respecting agencies;</li><li>(f) establish and monitor conflict of interest guidelines respecting the members and employees of the Council; and,</li><li>(g) exercise such additional authority as the Minister or Council may confer or delegate.</li></ul>
<b>Chair as spokesperson</b>	(2) The Chair shall be the spokesperson for Council in relations with the Legislative Assembly, agencies, the branches and ministries of the Government of Ontario and with other interested persons and organizations.

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<b>Chair as Presiding Officer</b>	(3) The Chair shall preside at hearings of the Council authorized under this Act.
<b>Delegation of Powers and Duties</b>	(4) The Chair may delegate in writing any power or duty of the Chair under this Act to any member or employee of the Council, subject to the approval of the Council and subject to any limitation or condition set out in the delegation.
<b>Staff</b> R.S.O., 1980 c. 418	<b>5.</b> (1) Such officers and other employees as are necessary to carry out the duties and functions of the Council shall be appointed under the <i>Public Service Act</i> .
<b>Advisory Committees and Experts</b>	(2) The Council may appoint advisory committees and retain experts and specialists to assist in carrying out its functions.
<b>Chair's Powers</b> R.S.O. 1980 c. 418	(3) The Chair may exercise, with respect to the employees of the Council, the powers and duties of a deputy minister under the <i>Public Service Act</i> .
<b>Powers and Duties of Council</b>	<b>6.</b> (1) It is the duty of the Council and it has the power:
<b>Examine Applicants</b>	(a) at the request of the appointing authority after consultation with the chair or chairs of the agency or agencies affected, to invite applications for and to interview and examine applicants and to maintain a current inventory of applicants qualified for appointment to agencies and to make the inventory available to agencies and the public;
<b>Recommend Applicants for Appointments</b>	(b) at the request of the appointing authority, to make recommendations to the appointing authority respecting the suitability and qualifications of applicants for appointment and reappointment to agencies;
<b>Education</b>	(c) to offer educational courses to members of agencies, in the duties and functions, conduct of proceedings, and the rules, practices and procedures of agencies;

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<b>Advise on Evaluation of Members</b>	(d) to develop standards respecting the evaluation and appraisal of the performance and suitability for reappointment of the members of an agency;
<b>Advise on Benefits</b>	(e) to make recommendations respecting remuneration, benefits and tenure of the members of agencies;
<b>Advise on Rules</b>	(f) to review the rules, practices and procedures adopted by agencies, and to assist agencies in the development and formulation of rules, practices and procedures;
<b>Review Rules</b>	(g) to examine, to keep under continuous review and to make recommendations respecting the adherence by agencies to the rules, practices and procedures adopted by them;
<b>Recommend</b>	(h) to make recommendations respecting the inclusion or exclusion of agencies listed in Schedule I of this Act;
<b>Support Services</b>	(i) to maintain and make available to agencies, common support services;
<b>Copies of Decisions</b>	(j) to maintain and to make available to agencies, and to the public, library services and a central registry of orders and decisions of agencies;
<b>Costs and Delay Reduction</b>	(k) in consultation with the chair or chairs of the agency or agencies affected, and to make recommendations respecting the reduction of costs and delays incurred in proceedings before agencies;
<b>Effectiveness Studies</b>	(l) in consultation with the chair or chairs of the agency or agencies affected, to make recommendations to the agencies and to the Ministers responsible for each agency affected respecting the evaluation of the effectiveness of agencies in carrying out their statutory duties;

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<b>Conflict of Interest</b>	(m) in consultation with the chair or chairs of the agency or agencies affected, to make recommendations to the Minister respecting the establishment and enforcement of conflict of interest standards for members of agencies;
<b>Funding of Agencies</b>	(n) to make recommendations to the Minister respecting the funding and recovery of the expenses of agencies;
<b>Increased Public Recourse to Agencies</b>	(o) to make recommendations respecting ways to make recourse to and the services of agencies more available to the public;
<b>Mediation and Conciliation Services</b>	(p) in consultation with the chair or chairs of the agency or agencies affected, to examine and make recommendations respecting ways to make mediation and conciliation services and settlement conferences more available to parties in proceedings before agencies;
<b>Review Legislation</b>	(q) to make recommendations respecting proposed legislation affecting agencies;
<b>Research</b>	(r) in consultation with the chair or chairs of the agency or agencies affected, to conduct research and to make recommendations respecting law and policy affecting the administration and operation of agencies; and,
<b>General</b>	(s) to perform such other functions respecting the operation and administration of agencies as may be required by the Minister.
<b>Council Powers</b>	(2) The Council shall have the powers of a Tribunal under Part I of this Act.
<b>Subcommittee on Appointments</b>	7. Where the Council carries out the duties set out in paragraphs 6(1)(a) (Examination of Applicants), 6(1)(b) (Recommendation of Applicants), and 6(1)(d) (Evaluation of Members), the Council may appoint subcommittees of

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the Council composed of members of the Council, and others, including members of the public, members of agencies, and representatives of Management Board of Cabinet and the Ministry of the Attorney General, to assist and advise the Council.

**Subcommittee  
on Rules**

**8.** Where the Council carries out the duties set out in paragraphs 6(1)(f) (Advise on Rules), 6(1)(g) (Review of Rules), 6(1)(h) (Recommendations respecting Schedule I) and 6(1)(q) (Review of Legislation), the Council may appoint subcommittees composed of members of the Council, and others, including members of the public, professors of law, members of the Law Society of Upper Canada, members of agencies, judges of the High Court, and representatives of the Ministry of the Attorney General, to assist and advise the Council.

**Generic  
Reviews**

**9.** (1) The Lieutenant Governor in Council, the Minister, or an agency, may request the Council to investigate and report on any question of law or policy or other matter affecting an agency or agencies.

(2) The Council may investigate and report on any question of law or policy or other matter affecting an agency or agencies.

**Removal of  
Members**

**10.** (1) The Council may receive and may investigate complaints and make recommendations respecting the conduct of a the chair or a member of an agency, or the capacity of the chair or the member to carry out the functions of his or her office.

(2) A recommendation that a chair or a member be removed shall be made only if,

(a) the chair or member has become incapacitated or disabled from the due execution of his or her office by reason of,

(i) infirmity,

(ii) conduct that is incompatible with the due execution of his or her office; or,



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(iii) having failed to perform the duties of his or her office.

(3) The Council shall not make a recommendation unless the member has been notified of the investigation and given an opportunity to be heard and to produce evidence.

(4) The Council shall not investigate a complaint and shall not make a recommendation unless the chair of the agency affected has been notified of the investigation and has been consulted.

(5) Part I of this Act applies to proceedings under this section.

(6) An investigation under this section may be conducted by the Council at its own motion.

**Appointing  
Authority to  
Consider  
Council  
Recom-  
mendations**

**11.** (1) The appointing authority shall consider the recommendations of the Council respecting the suitability and qualifications of applicants for appointment to an agency before making an appointment of a member to an agency.

(2) Agencies shall assist the Council in carrying out its duties and shall consider the recommendations of the Council.

**Ombudsman**

**12.** Where an agency is the subject of a complaint and an investigation by the Ombudsman under the *Ombudsman Act*, the Ombudsman shall advise the Council of the nature of the complaint and, if the agency requests, shall consult with the Council before making a report or a recommendation respecting the complaint.

**FIPPA**

**13.** Where the head of an agency refuses to disclose a record in response to a request for access to a record, and where the refusal of the head is the subject matter of an appeal to the Information and Privacy Commissioner under the *Freedom of Information and Protection of Privacy Act*, the Information and Privacy Commissioner shall advise the Council of the subject matter of the appeal and, if the agency requests, shall consult the Council before making an order disposing of the issues raised by the appeal.

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**Ontario  
Human Rights  
Commission**

**14.** Where a complaint has been made or initiated respecting an act of discrimination or an alleged act of discrimination by an agency, the Ontario Human Rights Commission shall advise the Council of the subject matter of the complaint and, if the agency requests shall consult with the Council before making a recommendation with respect to the complaint.

**Provincial  
Auditor**

**15.** Where the Provincial Auditor audits the books and financial records of an agency, the Auditor shall advise the Council of the nature of the findings and if the agency requests shall consult with the Council before completing the audit report.

**Right to  
Disclose  
Confidential  
Information**

**16.** (1) Despite the provisions of secrecy or confidentiality in the statutes set out in Schedule II to this Act, an agency at the request of the Council, shall disclose information to the Council for the purpose of enabling the Council to better carry out its duties and functions under this Act.

(2) The Council shall keep confidential the information disclosed to it under this section.

**Personal  
Information  
Exempt**

(3) Personal information disclosed by agencies, or supplied by applicants for appointment to agencies, including information and reports compiled in connection therewith by the Council shall not be disclosed without the consent of the person affected or the applicant.

**Reports**

**17.** (1) The Council shall report to the Minister from time to time on the activities of the Council.

(2) The Council shall report to the Assembly from time to time on the activities of the Council.

**Non-  
Compellability**

**18.** (1) The members and employees of the Council shall not be compellable to give evidence in any court or tribunal, or in matters arising under the *Ombudsman Act*, or under the *Freedom of Information and*

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*Protection of Privacy Act* or in any other investigation, review or proceeding, in respect of anything done or said in the course of a meeting, proceeding, review, investigation or other business of the Council.

(2) The members and employees of the Council shall not be liable for anything done or said in the course of a meeting, proceeding, review, investigation, or other business of the Council.

(3) The members and employees of the Council shall not be liable for court costs in proceedings in respect of a meeting, proceeding, review, investigation or other business of the Council.

(4) The notes, documents, record of proceedings and minutes of the Council, its members and employees shall not be compellable in any court, or tribunal, or in matters arising under *Ombudsman Act* or under the *Freedom of Information and Protection of Privacy Act* or in any other review proceeding or investigation in respect of a meeting, proceeding, review, investigation or other business of the Council.

**Amendment to Schedule**     **19.** The Lieutenant Governor in Council may amend Schedules I and II by regulation.

**Minister**             **20.** The Lieutenant Governor in Council shall appoint a member of the Executive Council to be the Minister responsible for administering this Act.

**Regulations**        **21.** The Lieutenant Governor in Council may make regulations,

(a) respecting the educational courses to be offered to members of agencies;

(b) respecting the rules of procedure to be adopted by agencies;

(c) respecting the selection of applicants for appointments to agencies;

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- (d) respecting the appraisal of the performance of members of agencies;
  - (e) respecting conflict of interest rules applicable to members of agencies;
  - (f) respecting the rules of procedure to be adhered to by the Council in hearings.



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## 8.16 EXPERIENCE IN OTHER JURISDICTIONS

For precisely the same reasons, among others, a number of jurisdictions have created a Council or body to coordinate the performance of administrative agencies. I felt that it would be useful to the Government if I opened up communications with these jurisdictions on the subject of how they have dealt with coordination. I have included a bibliography of material available to the reader.

May I caution the reader in reviewing the following material on two facts.

- (i) The Council proposed has no appellate function to avoid difficulty because of Section 96 of our Constitution. The Council is administrative only and is absolutely within the constitutional capacity of Ontario.
- (ii) People who comment upon the creation of a new system of justice in Australia frequently confuse the Appeals Tribunal of Australia, with the Administrative Review Council of Australia. They are not the same and do not have the same functions.

## UNITED KINGDOM

I believe that the Council on Tribunals of the United Kingdom is perhaps the closest model to that which I propose, although it is even more structured than I would recommend for Ontario. The UK Council was created in 1958 and arose out of a study and a Report often called the “Franks Committee Report”. The result of the Report is that the Committee recommended that all procedures should exhibit “openness, fairness and impartiality.”

The Committee expressed itself this way:

“In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of the Departments concerned with the subject-matter of their decision.”

Apparent in this recommendation (opposed by the Civil Service) was the view that agencies (adjudicative and regulatory) should not be conceived as part of the departmental operations. The Committee did not believe that any such agency could achieve the three goals stated if it was part of the administrative operations of a department.

The Committee commented as have I, about the great diversity in the kinds and groupings of administrative agencies (see Chapter Two of this Report) and that they operate with no coordination, thereby increasing their public cost and reducing their potential efficiency.

The Committee pointed out, as have I, that regardless of the fact that there are diverse mandates for agencies for perfectly sound reasons, nevertheless:

“the wide variations in procedure and constitution which now exist are much more the result of *ad hoc* decisions, political circumstance and historical accident than of the application of general and consistent principles. We think that there should be a standing body, the advice of which would be sought whenever it was proposed to establish a new type of tribunal and which would also keep under review the constitution and procedure of existing tribunals.” (Report, Para.128)

In 1958, the Council on Tribunals was established, by the *Tribunals and Inquiries Act*, the Annual Reports of which are listed in the appendix. The Council is composed of part-time members, 16 in number drawn from all walks of life, including the Civil Service.

The powers of the Council are set out in section 1 of the Act, as follows:

- (a) to keep under review the constitutions and working of the tribunals specified in Schedule 1 to this Act... and from time to time, to report on their constitution and working;
- (b) to consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals other than the ordinary courts of law, whether or not specified in Schedule 1, or any such tribunal;

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- (c) to consider and report on such matters as may be referred as aforesaid, or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure.”

The Act also gives to the Council the duty to make recommendations concerning the appointment of members of agencies and the “Minister shall have regard to the recommendations”. Sections 10 and 11 also provide that no rules of procedure of any tribunal shall be made or changed without prior consultation with the Council. In practice the consultative role as opposed to a power to impose rules, does not seem to have created much difficulty.

The Council reports to the Lord Chancellor. The closest analogy in Ontario would be the Attorney-General. The Council must be consulted before any tribunal is removed from or added to the Schedule. Changes are made by an OIC. I should observe that the Council is advisory and consultative in the same way as the Council I propose, except that I propose that the Ontario Council have power to approve the rules of procedure of the scheduled agencies.

Although the Act does not require it, the sensible practice which I recommend in many places in this Report, of consulting the Council before amending or introducing legislation dealing with the scheduled agencies has developed and appears to work well. (In France, the Council must approve the rules and must approve the legislation.) Interestingly enough, the Ombudsman sits on the Council but he has no power to deal with tribunal decisions, whereas in Ontario he can be a veritable *tour de force*.

The Council often attends during the hearings of tribunals as an educational and information-gathering exercise.

The Lord Chancellor in one of his frequent reports to Parliament described the work of the Council in this way:

“In all their work, the Council continues to pursue some basic themes. Thus, they try to ensure that people are granted a hearing over proposals which affect their interests; that rights of appeal against administrative decisions are given wherever appropriate and not eroded when they exist; that procedures concerning hearings are set out in published and binding rules; that parties are treated equitably and neither side is given an unfair advantage; that adequate reasons are always given for decisions; and that time limits are fair and reasonable.”

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The Council is also concerned that the wording of forms and explanatory leaflets should be as clear and simple as possible, so that people who wish to take part in tribunal or inquiry procedures without professional help can do so.

I would like to emphasize the words of the Lord Chancellor when he states “so that people who wish to take part in tribunal or inquiry procedures without professional help can do so.” To my mind, this makes it clear that judicialization for the sake of judicialization is not a goal in England as many would try to make it here in Ontario.

It is also clear that the Annual Report of the Council is an important document and operates as much by moral suasion as by anything. I am also advised that the initial suspicion of the Civil Service and Ministries has given way to much goodwill and respect for the Council. I believe that the same would be true in Ontario. I do not want to be seen to pick away at the Rules Committee of the *SPPA* but although it is required by law to produce an Annual Report to the Attorney-General, it has only done so once, in 18 years. One criticism which has been made of the UK Council is that it is composed of too many unpaid amateurs and that something that is anyone’s business can become no one’s business. My proposal gets around this observation by placing men and women with an interest, a concern and a knowledge of the matters with which the Council will deal, on the Council, and by paying non-government people fair but modest remuneration for the first two year trial experience.

A second criticism of the UK Council is that it is under-funded and while it should sponsor research and enquiry, it must rely on the work of others. The Ontario Council can avoid this receiving a modest budget, approved by Management Board. And in the budget, some work can be done for Management Board, but without committing the Board, since both Management Board and the Council are concerned with cost effectiveness and efficiency.

## CONCLUSION

I believe that the UK Council is an excellent precedent and has been seen to get over the initial suspicion by Ministries and others that one will get in the way of the other. There is the feeling by some that the Council could accomplish more if it had more direct power and better funding, but I believe that only the powers I have set out are necessary, and the funding, certainly in the beginning is not a major issue, particularly when this Report has clearly shown some substantial sources of additional revenue and opportunities for cost effectiveness.

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The USA has approached the coordination of administrative agencies by way of a different method which is called The Administrative Conference of the United States. There is an immense amount of literature on this subject which I have reviewed, which asserts very much the same needs to which I have addressed the reader's attention in this and earlier chapters.

The Conference was created in 1964 and has been operative since 1968. The force behind the creation of the Conference was a belief that there must be some coordination and monitoring of administrative practice and procedure of Federal Administrative Agencies. The goal of the Conference is not greatly different from that of the Council which I recommend. The *Administrative Conference Act* 5 U.S.C., section 571:

“It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.”

The Conference is not authorized to look at substantive policy committed to agency discretion, nor should the Ontario Council be authorized to do so. Like the UK Council, the USA Conference operates by recommendation and persuasion. The Conference consists of not less than 75 and not more than 91 members and includes agency chairs, civil servants and not less than 1/3 and not more than 2/5 shall be public members. The Conference consists of an Assembly (all members), and a Council (small), a Chair and staff. The Chair is full-time and on an annual salary, the other members are part-time and are paid travelling expenses and a *per diem* rate.

The Conference is said to be successful but is thought to be too academically inclined because its work is oriented more towards general principles of administrative law versus concentration upon monitoring and assessing the actual practices and procedures of agencies. I believe that this inadvertence can be avoided by the substantial representation of operating chairs of agencies on the Ontario Council. The Conference is relevant to Ontario

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because it was created for exactly the same reasons I propose. It is larger than needed in Ontario and not as precise as the UK model nor as precise as I would propose for Ontario.

## AUSTRALIA

Australia has also, for the same reasons, set up a Council in its country but the Australians have gone a great deal further than anyone, but France, in making changes. After an intense national study, the Parliament of Australia enacted The *Administrative Appeals Tribunal Act, 1975*, (later amended in 1977) which created two bodies. The first is a tribunal called the Administrative Appeals Tribunal (which hears appeals from the decisions of administrative agencies, not proposed for Ontario) and the Administrative Review Council, which acts very much like the UK Council, the USA Conference and an Ontario Council which I propose in this Report.

The Administrative Appeals Tribunal is a court-like tribunal which hears appeals from all administrative decisions *de novo*. It decides questions of law and fact. The tribunal is made up of judges and lawyers and “non-presidential members”. Non-presidential members do not preside but have very high qualifications, education or areas of special skill.

I do not wish to take the time to analyze this tribunal because I do not think that it is remotely appropriate for Ontario. It is really the partial equivalent of the Federal Court of Canada. We have had enough trouble in Canada ‘mucking around’ with Section 96 appointments to justify steering away from this kind of a tribunal in Ontario, although the reader will see that Professor Ouellette toys with a pale version of the Australian Tribunal in his Report. An additional justification for veering away from this kind of tribunal is that the tribunal is showing the typical penchant for reviewing government legislation “at the highest level”. Again, this is under the usual judicial guise of making “non-legislative” decisions on the most subjective of criteria, sometimes resting on unconstitutionality, sometimes on excess of jurisdiction but nearly always because the judges don’t like what they see.

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The Administrative Review Council is however, bang on our point and was created for precisely the same reasons that we ought to create the Council in Ontario, namely the need to coordinate and harmonize on an “across-the-system” basis of agencies.

This Council is composed of the President of the Appeals Tribunal, the Ombudsman, the Chairperson of the Law Reform Commission and not less than 3 and not more than 10 part-time members to be appointed by an OIC. The part-time members must have extensive experience in public administration or an extensive knowledge of administrative law. The mandate of the Council is covered by Section 51:

“The functions of the Council are:

- (a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body;
- (b) to make recommendations to the Minister as to whether any of those classes of decisions should be subject to review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review;
- (c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice;
- (d) to inquire into the adequacy of the procedures in use by tribunals or other bodies engaged in the review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those procedures;
- (e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted;...”

In addition, there is a general omnibus clause that gives the Council the authority to do all things necessary to carry out the above functions. Thus the Council is seen as the coordinating and monitoring authority that a well-functioning system of many agencies requires. The Council itself stated that “A monitor of the system is essential, and the Council will fulfil that function.” The Council sees itself as the “promoter and not the executioner” of change. Like the Australian Review Council, I recommend an Ontario Council which should operate through consultation, encouragement and recommendation.

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## NEW ZEALAND

New Zealand's Council is an adjunct of the Public Law Division of the New Zealand Law Reform Commission. The Council reflects the unique needs of New Zealand and need not be discussed in detail.

## FRANCE

*Le Conseil d'Etat* (Council) was first created in an earlier form in 1525 and reestablished by Napoleon in 1799. The *Conseil* has two major functions, being advisory and adjudicative.

All administrative appeals and reviews were taken away from the courts long ago in France, and are dealt with, heard and decided through the *Conseil*. Thus at once it has a function unlike anything I would propose. One can see at once that the *Conseil* concept rejects the Dicey and McRuer view that only the courts can protect the individual from the abuses and greed of the bureaucracy (the state). Even the advisory function is much more potent and controlling than anything we have ever thought of for Canada. The advisory function includes advising the government of France on all Parliamentary bills and all regulations (just imagine the cardiac arrest that would give to the civil service, if introduced in Canada); and advising the government on all delegated legislation. The *Conseil* is also the general legal adviser to the government. The President of the *Conseil* is the President of France.

I do not think that it is profitable to trace the French system further and did so only to this point because one hears so many incorrect references to the *Conseil* and its appropriateness for Ontario. The differences between the constitution of France and Canada make any further comparisons of little value.

## QUEBEC

Before leaving the subject of the Council for Ontario, I would like to review with the reader some published comments of mine on what is known as the Ouellette Report of 1987 prepared for the Province of Quebec to deal with some of its administrative agencies.



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## THE OUELLETTE REPORT

In 1986, the Minister of Justice of Quebec directed that Professor Yves Ouellette of the University of Montreal, chair a work group to study and report upon administrative tribunals in Quebec.

In 1987 the work group produced what I call the Ouellette Report, which was published in French and remains untranslated into English, except for a summary, publicly made available in April 1988. The Report is of interest to those who wish to keep up to date on changes in the structure of administrative agencies in Canada. My conclusion, having met with Professor Ouellette, and having studied the Report, is that although some parts of it are of applicability within a common law province, much of it is applicable only to Quebec.

The mandate of Ouellette was, in particular, to examine the jurisdictions that could be transferred to administrative tribunals or that could be consolidated or abolished; to analyze the expediency of unifying or improving the rules of evidence or procedure applicable to administrative tribunals, and to make recommendations on the status of members as well as the structures and operational requirements of an administrative appeals tribunal.

The working group took as a basic principle that the underlying reason for having administrative tribunals is to favour a decision-making process that is accessible, rapid and less costly than that of the traditional courts, yet offers the advantages of quasi-judicial rules, expertise and inter-disciplinary skills. The working group, after receiving and analyzing about 50 briefs and hearing several experts and representatives of union and professional organizations, formulated 74 recommendations. It recommended the enactment of a general law on administrative tribunals. This law would consolidate provisions relating to:

- the organization of administrative tribunals;
- the status of members of administrative tribunals;
- the administrative procedure;
- the creation of a administration and reform structure, namely the Council of Administrative Tribunals.

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This law would be under the responsibility of a single Minister appointed by the Government. However, the Ministers responsible for the various laws that administrative tribunals are called upon to apply would continue to be in charge of the application of these laws.

Twelve bodies were selected for purposes of observation and recommendation. They were essentially bodies sitting in review of the initial decision of another, in accordance with a quasi-judicial process.

The group did not favour setting up a super organization under the authority of a chair, nor the creation of a single administrative appeals authority over existing tribunals. In fact, with regard to the first hypothesis, the group believed that it would lead to excessive centralization, destroy the specific character of tribunals and could alienate the clientele normally associated with a particular body. As to the second hypothesis, it appeared constitutionally fragile to the group when juxtaposed with the Superior Court's power of review. (Equally true in Ontario in my opinion, although constitutionally possible.)

The group recommended the consolidation of certain jurisdictions assigned to various administrative bodies to four administrative tribunals. These tribunals were to be governed by an Act respecting Administrative Tribunals, which has no real applicability in Ontario.

### **The Status and Work Conditions of Members of Administrative Tribunals**

The Oullette Report disclosed defects in the present system.

- the absence of uniformity in the rules applicable to contracts for the engagement of members;
- the diversity of functions (member, assessor with or without a decision-making vote, judge...);
- the precarious nature of their appointment (revocation clause, unilateral termination clause...).

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Accordingly, the group proposed modifications aimed at ensuring the independence of members, their excellence and the openness of their institution in the eyes of the public. In this respect, the group recommended principally:

- that the members of administrative tribunals have an identical status both in regard to their appointment and in their institution in the eyes of the public;
- that these members be recruited in accordance with a procedure provided in the Act or a regulation including, in particular, a public notice of competitive examinations, the formation of a selection committee, the obligation of drawing up a list of persons qualified to fill the posts and appointment by government order in council;
- that the candidates have a minimum of ten years of professional experience relevant to the post to be filled;
- that the members be appointed for a mandate of seven years with the possibility of renewal;
- that not later than six months before the expiry of a member's mandate, the Council on Administrative Tribunals send to the Minister and to the member concerned its recommendation as to the possibility of renewal, and that not later than three months before the expiry of the member's mandate, the Government notify the member of its decision whether to renew or not to renew the mandate.

To that end, the Oullette Report recommended:

- that the Council's function be to receive from the chairs of each of the 4 new tribunals an annual evaluation report on their members to be filed in their records;
- that in the case of non-renewal in spite of a favourable recommendation of the Council, the member may request reinstatement in the Public Service upon certain conditions;
- that in the case of non-renewal following an unfavourable recommendation of the Council, the member be reinstated in the Public Service if he came from that Service, or receive a separation indemnity if he did not come from the Public Service.

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## THE REPORT ALSO RECOMMENDED:

- that the members be subject to a code of ethics;
- that the members be governed by the same work conditions and that these conditions be stipulated in statutory provisions. To that end, the Report recommended that the principle of identical remuneration be recognized and suggested that a uniform salary scale for members be determined based on a percentage of the salary of provincially appointed judges. However, salary levels could vary but only in those cases where they would prove inconsistent with the market conditions respecting members of a particular profession;
- that the directors of bodies have direct contact with the activities of the said bodies by sitting at their proceedings.

As a prerequisite to this, only the persons considered qualified to become members by a selection committee could be eligible for these posts of authority whose mandate would also be seven years;

- that in order to ensure transition from the present system to the one proposed, a reinstatement committee be constituted in order to verify the qualifications and aptitudes of present members for appointment as members of one of the four tribunals, and that only the members declared qualified by such a committee be appointed members of a new tribunal by the government, the others being granted career reorientation allowances, separation indemnities and compensation for the unexpired term of their mandate.

## THE MANAGERIAL FRAMEWORK OF ADMINISTRATIVE TRIBUNALS AND THE DEVELOPMENT OF THE SYSTEM

In its organization initiative of the entire sector of administrative tribunals, the working group recognized the need for giving these bodies a managerial framework. In this regard, the group recommended the establishment of a Council of Administrative Tribunals. Financed directly by contributions from the budget of administrative tribunals, the Council of Administrative Tribunals would have several precise functions such as responsibility for



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recruitment and the development of lists of persons considered qualified to occupy the quasi-judicial functions, informing the public on access and recourses to these tribunals, the development of a code of ethics, as well as the initial and continuing training of members. This Council would also have the task of advising the Government with regard to the creation and abolition of bodies or the creation and abolition of administrative law recourses.

## COMMENT ON THE OUELLETTE REPORT

The Ouellette Report is an important document and study in Canada. It has, however, a limited applicability to Ontario because of the differences in our systems. In looking at the Report, one can see the same basic needs for coordination in Quebec as have been apparent in other jurisdictions. In looking at the Report, I would make several comments.

**First**, one has to understand that in Quebec many adjudicative (often called legislative by the courts) decisions are carried out by bureaucrats which are not subject to any judicial review or appeal. Many of the same decisions are rendered, totally or partially by administrative agencies in the common law provinces.

**Second**, one has to be aware of the mixture in Quebec of the judiciary and the administrative. This is fundamental to understanding the Ouellette Report. This does not exist in Ontario.

**Third**, one must be familiar with the structure of the Provincial Court of Quebec. By the standards of other provinces, the court is large, somewhat anachronistic and may be unconstitutional in terms of many of its functions including review and appeal. The Provincial Court of Quebec is really composed of what I would call magistrates, who are lawyers with 10 years experience. They are not judges in the traditional sense of section 96 of the Constitution. They are called “The Honourable” and possess some powers which are in my view unconstitutional. About 40 Quebec Acts give these magistrates the power to hear appeals from, and review decisions of administrative tribunals. The absence or presence of privative clauses apart, these powers from time to time have been struck down by the SCC.

**Fourth**, in Quebec many administrative law functions are carried out by “judges” of the Provincial Court such as expropriation compensation which in other provinces like Ontario is determined by an administrative agency like the Ontario Municipal Board.

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**Fifth**, the Ouellette Report, is in my view an attempt to judicialize a selected few of Quebec's administrative tribunals. It is tribunal oriented, yet it omits regulatory agencies, advisory agencies, disciplinary and licensing agencies, native and language agencies for example.

**Sixth**, it fails in my view to explain the rationale for agencies in Quebec. The Report seemingly identifies a tribunal as more of a court than an agency. All tribunals are agencies but all agencies are not called tribunals. Therefore one has to appreciate that the Ouellette Report only looked at the part of the administrative structure and practice which deals with some of Quebec's agencies. It overlooked perhaps 50% of the decision-making, 100% of the regulatory and 100% of the advice-giving agencies. (The reporting function of agencies is subject to some judicial constraints.)

**Seventh**, the report silently elevates instead of INTERRS, the separation of administrative, legislative and judicial functions.

**Eighth**, to my mind the Ouellette Report fails to distinguish (as does the Law Reform Commission of Canada) the huge difference between the independence of administrative agencies and their accountability. The two words are quite distinguishable. One leads to one goal while the other leads elsewhere. I believe that the Report has an extravagant regard for tribunal independence and unintentionally trivializes their accountability. No agency by virtue of its very nature is independent of government and all are accountable to it. Independence in decision-making is perhaps what is intended, but that is not the same as independence in the sense most often related to the courts.

**Ninth**, for several reasons, Chapter I (consolidation of tribunals) has no applicability elsewhere than in Quebec.

A major thrust of the Ouellette Report amalgamates 12 Quebec agencies into four major tribunals, which are not really relevant to Ontario. The second major thrust of the Report recommends the creation of a Council of Tribunals.

- i) The Council is to be consulted on appointments to the proposed tribunals. I believe that this is desirable, so long as it is recognized that the "tribunal" performs a consultative service. A properly defined role in this connection is very important.

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- ii) The Council would conduct training courses in law and practice for tribunal members. This is very important indeed.
  - iii) The Council would assist in developing rules of procedure. This is fundamental in my opinion.
  - iv) The Council would establish and monitor a code of professional conduct. Here the “tribunal” emerges from the role of leadership to one of direction and enforcement. This can be done and is a useful service to governments, tribunals, and the public.
  - v) The Council is a forum which can deal with the removal of a tribunal member and evaluate the performance of tribunals. (The former is the prerogative of the government but the latter is desirable). Furthermore, I would have preferred that the Council deal with all agencies which hold hearings and not just the limited number selected.

The Council's role basically, revolves around leadership, consultation and a monitoring service. I see it to be service oriented. My most recent advice is that legislation dealing with the Ouellette Report is under consideration.

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## 8.17 CONCLUSION

Thus I have recommended the creation of the Ontario Council for Administrative Agencies and have explained why and what the Council would do. I have also shown that many other jurisdictions have created a Council to fulfil very much the same role as the one envisaged for the Ontario Council. As I perceive the concept, I believe that it is in the interests of the public in this Province, which after all is why we have agencies in the first place.



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## APPENDIX 8-1

### STATUTORY POWERS PROCEDURE ACT

1. (1) In this Act,

- (a) “Council” means the Ontario Council for Administrative Agencies;
- (b) “licence” includes any permit, certificate, approval, registration or similar form of permission required by law;
- (c) “municipality” has the same meaning as in the Municipal Affairs Act, and includes a district, metropolitan and regional municipality and their local boards;
- (d) “statutory power of decision” means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,
  - (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
  - (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether he is legally entitled thereto or not;
- (e) “tribunal” means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute.

(2) A municipality, an unincorporated association of employers or council of trade unions who may be a party to proceedings in the exercise of a statutory power of decision under the statute conferring the power, shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to parties.

## PART I

### MINIMUM RULES FOR PROCEEDINGS OF CERTAIN TRIBUNALS

2. In this Part,

- (a) “hearing” means a hearing in any proceedings;
  - (b) “proceedings” means proceedings to which this Part applies.
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3. (1) Subject to subsection (2), this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under such Act or otherwise by law to hold or afford to the parties to the proceedings an opportunity for a hearing before making a decision.

(2) This part does not apply to proceedings,

(a) before the Assembly or any committees of the Assembly;

(b) in or before,

(i) the Supreme Court,

(ii) a county or district court,

(iii) a surrogate court,

(iv) a provincial court or a provincial offenses court established under the Provincial Courts Act,

(v) the Unified Family Court,

(vi) a small claims court, or

(vii) a justice of the peace;

(c) to which the Rules of Practice and Procedure of the Supreme Court apply;

(d) before an arbitrator to which the Arbitrations Act or the Labour Relations Act applies;

(e) at a coroner's inquest;

(f) of a commission appointed under the Public Inquiries Act;

(g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have to make; or

(h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned.

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4. Notwithstanding anything in this Act and unless otherwise provided in the Act under which the proceedings arise, or the tribunal otherwise directs, any proceedings may be disposed of by,

(a) agreement;

(b) consent order; or,

(c) a decision of the tribunal given,

(i) without a hearing, or

(ii) without compliance with any other requirement of this Act,

where the parties have waived such hearing or compliance.

5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

6. (1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal.

(2) A notice of hearing shall include,

(a) a statement of the time, place and purpose of the hearing;

(b) a reference to the statutory authority under which the hearing will be held; and

(c) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings.

7. Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings.

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

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9. (1) A hearing shall be open to the public except where the tribunal is of the opinion that,

- (a) matters involving public security may be disclosed; or
- (b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public;

in which case the tribunal may hold the hearing concerning any such matters in camera.

(2) A tribunal may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

10. A party to proceedings may at a hearing,

- (a) be represented by counsel or an agent;
- (b) call and examine witnesses and present his arguments and submissions;
- (c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

11. (1) A witness at a hearing is entitled to be advised by his counsel or agent as to his rights but such counsel or agent may take no other part in the hearing without leave of the tribunal.

(2) Where a hearing is in camera, a counsel or agent for a witness is not entitled to be present except when a witness is giving evidence.

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12. (1) A tribunal may require any person, including a party, by summons,

(a) to give evidence on oath or affirmation at a hearing; and

(b) to produce in evidence at a hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceedings and admissible at a hearing.

(2) A summons issued under subsection (1) shall be in Form 1 and,

(a) where the tribunal consists of one person, shall be signed by him; or

(b) where the tribunal consists of more than one person, shall be signed by the chairman of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal; and

(c) shall be served personally on the person summoned who shall be paid like fees and allowances for attendance as a witness before the tribunal are paid for the attendance of a witness summoned to attend before the Supreme Court.

(3) Upon proof to the satisfaction of a judge of the Supreme Court of the service of a summons under this section upon a person and that,

(a) such person has failed to attend or to remain in attendance at a hearing in accordance with the requirements of the summons;

(b) a sufficient sum for his fees and allowances has been duly paid or tendered to him; and

(c) his presence is material to the ends of justice,

the judge may, by his warrant in Form 2, directed to any sheriff, police officer or constable, cause such witness to be apprehended anywhere within Ontario and forthwith to be brought before the tribunal and to be detained in custody as the judge may order until his presence as a witness before the tribunal is no longer required, or, in the direction of the judge, to be released on a recognizance (with or without sureties) conditioned for appearance to give evidence.

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(4) Service of a summons and payment of tender of fees or allowances may be proved by affidavit in an application under subsection (3).

(5) Where an application under subsection (3) is made on behalf of a tribunal, the person constituting the tribunal, or where the tribunal consists of two or more persons, the chairman thereof may certify to the judge the facts relied on to establish that the presence of the person summoned is material to the ends of justice and such certificate may be accepted by the judge as proof of such facts.

(6) Where an application under subsection (3) is made by a party to the proceedings, proof of facts relied on to establish the presence of the person summoned is material to the ends of justice may be by affidavit of such party.

13. Where any person without lawful excuse,

(a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or

(b) being in attendance as a witness at a hearing, refuses to take an oath or make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his power or control legally required by the tribunal to be produced by him or to answer any question to which the tribunal may legally require an answer; or

(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal or by such party, inquire into the matter, and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of court.

14. (1) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to incriminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person,

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and no answer given by a witness at a hearing shall be used or be receivable in evidence against him at any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

(2) A witness shall be informed by the tribunal of his right to object to answer under section 5 of the Canada Evidence Act

15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible in as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible as evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute.

(3) Nothing is subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

(4) Where a tribunal is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

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(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document.

16. A tribunal may, in making its decision in any proceedings,
- (a) take notice of facts that may be judicially noticed; and
  - (b) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge.
17. A tribunal shall give its final decision and order, if any, in any proceedings, in writing and shall give reasons in writing thereof if requested by a party.
18. A tribunal shall send by first class mail addressed to the parties to any proceedings who took part in the hearing, at their address last known to the tribunal, a copy of its final decision and order, if any, in the proceedings, together with the reasons therefor, where reasons have been given, and each party shall be deemed to have received a copy of the decision or order on the fifth day after the day of mailing unless the party did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the copy of the decision order until a later date.
19. (1) A certified copy of a final decision or order, if any, of a tribunal in any proceedings may be filed in the office of the Registrar of the Supreme Court by the tribunal or by a party and, if it is for the payment of money, it may be enforced at the instance of the tribunal or of such party in the name of the tribunal in the same manner as a judgement of that court, and in all other cases by an application by the tribunal or by such party to the court for such order as the court may consider just.
- (2) Where a tribunal having power to do so makes an order or decision rescinding or varying an order or decision made previously by it that has been filed under subsection (1), upon filing in accordance with subsection (1) the order or decision rescinding or varying the order or decision previously made,
- (a) if the order or decision rescinds the order or decision previously made, the order or decisions previously made ceases to have effect for the purposes of subsection (1); or
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- (b) if the order or decision varies the order or decision previously made, the order or decision previously made as so varied may be enforced in a like manner as an order or decision filed under subsection (1).

20. A tribunal shall compile a record of any proceedings in which a hearing has been held which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
- (b) the notice of any hearing;
- (c) any intermediate orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;
- (e) the transcript, if any, of the oral evidence given at the hearing; and
- (f) the decision of the tribunal and the reasons therefor, where reasons have been given.

21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

22. A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation.

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

(2) A tribunal may reasonably limit further cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

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(3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practice in Ontario, appearing as an agent on behalf of a party or as an advisor to a witness if it finds that such a person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or advisor.

24. (1) Where a tribunal is of opinion that because the parties to any proceedings before it are so numerous or for any other reason, it is impracticable,

(a) to give notice of the hearing; or

(b) to send its decision and the material mentioned in section 18,

to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

(2) A notice of a decision given by a tribunal under clause (1)(b) shall inform the parties of the place where copies of the decision and the reasons therefor, if reasons were given, may be obtained.

25. (1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

(2) An application for judicial review under the Judicial Review Procedure Act, or the bringing of proceedings specified in subsection 2(1) of that Act is not an appeal within the meaning of subsection (1).

## PART II

## ONTARIO COUNCIL FOR ADMINISTRATIVE AGENCIES

(Old Part II is repealed. Sections 26 to 34 are replaced by new sections 26 to 46)

26. In this Part,

(a) “agency” means an agency, board, commission, or tribunal designated in Schedule I;

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- (b) “appointing authority” means the Lieutenant Governor in Council or a member of the Executive Council empowered to appoint the members of and agency;
  - (c) “Minister” means the member of the Executive Council appointed by the Lieutenant Governor in Council as the Minister responsible for this Act.

27. (1) The Statutory Powers Procedure Rules Committee is continued under the name of the Ontario Council for Administrative Agencies and may be composed of not less than nine members and not more than eleven members including,
- (a) representatives of the public who are not members of the public service of Ontario;
  - (b) a member of the Law Society of Upper Canada or a judge of the High Court;
  - (c) a senior official of the Ministry of the Attorney General;
  - (d) a senior official of the Management Board of Cabinet; and
  - (e) five members chosen from among the chairs of the agencies listed in Schedule I,

appointed by the Lieutenant Governor in Council.

(2) The members shall serve on a full time or a part time basis as the Lieutenant Governor in Council may determine.

(3) The Lieutenant Governor in Council shall appoint the Chair and the Vice Chair of the Council from among the members of the Council.

(4) A member of the Council shall be appointed for a term not more than three years and may be reappointed for a further term or terms.

(5) If the Chair of the Council is absent or if there is a vacancy in the office of the Chair of the Council, the Vice Chair shall act as Chair and have all the powers of the Chair.

(6) The Lieutenant Governor in Council may fill any vacancy in the membership of the Council or in the offices of the Chair or Vice Chair.

(7) The members of the Council shall be paid such remuneration and expenses as the Lieutenant Governor in Council may determine.

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- (8) A member of the Council who is also a chair or a member of an agency may continue to be the chair or a member of the agency.
28. (1) The Council shall hold such meetings as are necessary for the performance of its duties.
- (2) A majority of members of the Council and the Chair or Vice Chair constitute a quorum.
- (3) Subject to subsection 2(5), the Chair shall preside at all meetings of the Council.
- (4) Matters arising at a meeting of the Council shall be determined by a majority of the votes but if there is no majority vote, the vote of the Chair shall govern.
- (5) The Council shall adopt and publish rules respecting the conduct of its meetings and the performance of its duties and functions under this Act.
29. (1) The Chair shall be the chief executive officer of the Council and shall exercise the powers and perform the duties that are vested in the Chair by this Act, including but not restricted to, the duty and power to
- (a) make inquiries into matters necessary for the work of the Council;
  - (b) obtain information necessary for the work of the Council from agencies and other branches and ministries of the government;
  - (c) appoint members and others to committees of the Council;
  - (d) prepare estimates, budgets, and accounts;
  - (e) furnish assistance and advice on matters respecting agencies;
  - (f) establish and monitor conflict of interest guidelines respecting the members and employees of the Council; and,
  - (g) exercise such additional authority as the Minister or Council may confer or delegate.
- (2) The Chair shall be the spokesperson for Council in relations with the Legislative Assembly, agencies, the branches and ministries of the Government of Ontario and with other interested persons and organizations.
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- (3) The Chair shall preside at hearings of the Council authorized under this Act.
- (4) The Chair may delegate in writing any power or duty of the Chair under this Act to any member or employee of the Council, subject to the approval of the Council and subject to any limitation or condition set out in the delegation.
30. (1) Such officers and other employees as are necessary to carry out the duties and functions of the Council shall be appointed under the Public Service Act.
- (2) The Council may appoint advisory committees and retain experts and specialists to assist in carrying out its functions.
- (3) The Chair may exercise, with respect to the employees of the Council, the powers and duties of a deputy minister under the Public Service Act.
31. (1) It is the duty of the Council and it has the power:
- (a) at the request of the appointing authority after consultation with the chair or chairs of the agency or agencies affected, to invite applications for and to interview and examine applicants and to maintain a current inventory of applicants qualified for appointment to agencies and to make the inventory available to agencies and the public;
  - (b) at the request of the appointing authority, to make recommendations to the appointing authority respecting the suitability and qualifications of applicants for appointment and reappointment to agencies;
  - (c) to offer educational courses to members of agencies, in the duties and functions, conduct of proceedings, and the rules, practices and procedures of agencies;
  - (d) to develop standards respecting the evaluation and appraisal of the performance and suitability for reappointment of the members of an agency;
  - (e) to make recommendations respecting remuneration, benefits and tenure of the members of agencies;
  - (f) to review the rules, practices and procedures adopted by agencies, and to assist agencies in the development and formulation of rules, practices and procedures;
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- (g) to examine, to keep under continuous review and to make recommendations respecting the adherence by agencies to the rules, practices and procedures adopted by them;
  - (h) to make recommendations respecting the inclusion or exclusion of agencies listed in Schedule I of this Act;
  - (i) to maintain and make available to agencies, common support services;
  - (j) to maintain and to make available to agencies, and to the public, library services and a central registry of orders and decisions of agencies;
  - (k) in consultation with the chair or chairs of the agency or agencies affected, and to make recommendations respecting the reduction of costs and delays incurred in proceedings before agencies;
  - (l) in consultation with the chair or chairs of the agency or agencies affected, to make recommendations to the agencies and to the Ministers responsible for each agency affected respecting the evaluation of the effectiveness of agencies in carrying out their statutory duties;
  - (m) in consultation with the chair or chairs of the agency or agencies affected, to make recommendations to the Minister respecting the establishment and enforcement of conflict of interest standards for members of agencies;
  - (n) to make recommendations to the Minister respecting the funding and recovery of the expenses of agencies;
  - (o) to make recommendations respecting ways to make recourse to and the services of agencies more available to the public;
  - (p) in consultation with the chair or chairs of the agency or agencies affected, to examine and make recommendations respecting ways to make mediation and conciliation services and settlement conferences more available to parties in proceedings before agencies;
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- (q) to make recommendations respecting proposed legislation affecting agencies;
  - (r) in consultation with the chair or chairs of the agency or agencies affected, to conduct research and to make recommendations respecting law and policy affecting the administration and operation of agencies; and,
  - (s) to perform such other functions respecting the operation and administration of agencies as may be required by the Minister.

(2) The Council shall have the powers of a Tribunal under Part I of this Act.

32. Where the Council carries out the duties set out in paragraphs 31(1)(a) (Examination of Applicants), 31(1)(b) (Recommendation of Applicants), and 31(1)(d) (Evaluation of Members), the Council may appoint subcommittees of the Council composed of members of the Council, and others, including members of the public, members of agencies, and representatives of Management Board of Cabinet and the Ministry of the Attorney General, to assist and advise the Council.
33. Where the Council carries out the duties set out in paragraphs 31(1)(f) [Advise on Rules], 31(1)(g) [Review of Rules], 31(1)(h) [Recommendations respecting Schedule I] and 31(1)(q) [Review of Legislation], the Council may appoint subcommittees composed of members of the Council, and others, including members of the public, professors of law, members of the Law Society of Upper Canada, members of agencies, judges of the High Court, and representatives of the Ministry of the Attorney General, to assist and advise the Council.
34. (1) The Lieutenant Governor in Council, the Minister, or an agency, may request the Council to investigate and report on any question of law or policy or other matter affecting an agency or agencies.
- (2) The Council may investigate and report on any question of law or policy or other matter affecting an agency or agencies.
35. (1) The Council may receive and may investigate complaints and make recommendations respecting the conduct of the chair or a member of an agency, or the capacity of the chair or the member to carry out the functions of his or her office.
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(2) A recommendation that a chair or a member be removed shall be made only if the chair or member has become incapacitated or disabled from the due execution of his or her office by reason of,

- (i) infirmity,
- (ii) conduct that is incompatible with the due execution of his or her office; or,
- (iii) having failed to perform the duties of his or her office.

(3) The Council shall not make a recommendation unless the member has been notified of the investigation and given an opportunity to be heard and to produce evidence.

(4) The Council shall not investigate a complaint and shall not make a recommendation unless the chair of the agency affected has been notified of the investigation and has been consulted.

(5) Part I of this Act applies to proceedings under this section.

(6) An investigation under this section may be conducted by the Council at its own motion.

36. (1) The appointing authority shall consider the recommendations of the Council respecting the suitability and qualifications of applicants for appointment to an agency before making an appointment of a member to an agency.

(2) Agencies shall assist the Council in carrying out its duties and shall consider the recommendations of the Council.

37. Where an agency is the subject of a complaint and an investigation by the Ombudsman under the *Ombudsman Act*, the Ombudsman shall advise the Council of the nature of the complaint and, if the agency requests, shall consult with the Council before making a report or a recommendation respecting the complaint.

38. Where the head of an agency refuses to disclose a record in response to a request for access to a record, and where the refusal of the head is the subject matter of an appeal to the Information and Privacy Commissioner under the *Freedom of Information and Protection of Privacy Act*, the Information and Privacy Commissioner shall advise the Council of the subject matter of the appeal and, if the agency requests, shall consult the Council before making an order disposing of the issues raised by the appeal.

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39. Where a complaint has been made or initiated respecting an act of discrimination or an alleged act of discrimination by an agency, the Ontario Human Rights Commission shall advise the Council of the subject matter of the complaint and, if the agency requests shall consult with the Council before making a recommendation with respect to the complaint.
40. Where the Provincial Auditor audits the books and financial records of an agency, the Auditor shall advise the Council of the nature of the findings and if the agency requests shall consult with the Council before completing the audit report.
41. (1) Despite the provisions of secrecy or confidentiality in the statutes set out in Schedule II to this Act, an agency at the request of the Council, shall disclose information to the Council for the purpose of enabling the Council to better carry out its duties and functions under this Act.
- (2) The Council shall keep confidential the information disclosed to it under this section.
- (3) Personal information disclosed by agencies, or supplied by applicants for appointment to agencies, including information and reports compiled in connection therewith by the Council shall not be disclosed without the consent of the person affected or the applicant.
42. (1) The Council shall report to the Minister from time to time on the activities of the Council.
- (2) The Council shall report to the Assembly from time to time on the activities of the Council.
43. (1) The members and employees of the Council shall not be compellable to give evidence in any court or tribunal, or in matters arising under the *Ombudsman Act*, or under the *Freedom of Information and Protection of Privacy Act* or in any other investigation, review or proceeding, in respect of anything done or said in the course of a meeting, proceeding, review, investigation or other business of the Council.
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(2) The members and employees of the Council shall not be liable for anything done or said in the course of a meeting, proceeding, review, investigation, or other business of the Council.

(3) The members and employees of the Council shall not be liable for court costs in proceedings in respect of a meeting, proceeding, review, investigation or other business of the Council.

(4) The notes, documents, record of proceedings and minutes of the Council, its members and employees shall not be compellable in any court, or tribunal, or in matters arising under *Ombudsman Act* or under the *Freedom of Information and Protection of Privacy Act* or in any other review proceeding or investigation in respect of a meeting, proceeding, review, investigation or other business of the Council.

44. The Lieutenant Governor in Council may amend Schedules I and II by regulation.

45. The Lieutenant Governor in Council shall appoint a member of the Executive Council to be the Minister responsible for administering this Act.

46. The Lieutenant Governor in Council may make regulations,

- (a) respecting the educational courses to be offered to members of agencies;
  - (b) respecting the rules of procedure to be adopted by agencies;
  - (c) respecting the selection of applicants for appointments to agencies;
  - (d) respecting the appraisal of the performance of members of agencies;
  - (e) respecting conflict of interest rules applicable to members of agencies;
  - (f) respecting the rules of procedure to be adhered to by the Council in hearings.
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## PART III

### ADDITIONAL POWERS FOR CERTAIN TRIBUNALS

(This Part is a new addition)

47. (1) The powers set forth in this Part may be exercised by the tribunals listed in Schedule I of this Act.

(2) The Lieutenant Governor in Council may, by Order in Council, withdraw one or more powers set forth in this Part from a tribunal listed in Schedule I of this Act.

48. These sections shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding governed by this Act.

49. (1) The agency has jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, and, unless such determination is patently unreasonable, or unless the process whereby the agency makes its determination is not provided for by its mandating statute, and is manifestly unfair.

(2) In determining whether a decision of an agency is patently unreasonable, the court shall consider,

- i) the purpose served by the agency,
- ii) the social, economic and other policies administered by the agency,
- iii) the legislative history of the statutory or other instrument establishing the agency,
- iv) the effect on the policies and programs administered by the agency of alternate interpretations of the agency's mandating legislation.

(3) The agency is entitled to be heard by counsel on any review or appeal under this Act and may make submissions to the court respecting the jurisdiction policies and nature of the activities regulated by the agency for the guidance of the court.

50. (1) This section applies despite any other statute or regulation governing rules of procedure as adapted by or applicable to all agencies listed in Schedule 1 to the SPPA.

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(2) Within six months from the coming into force of this Act, the Council shall prepare model rules of procedure.

(3) The model rules of procedure shall apply to all proceedings of agencies listed in Schedule I.

(4) No rules of procedure other than the model rules of procedure shall be adopted or followed by an agency unless the rule has been approved by the Council.

(5) Nothing in this section is to prevent an agency from making a ruling for the purposes of a particular case.

(6) Rules made in accordance with this section shall be published in the Official Gazette and made available to the public in English and French.

51. (1) The Lieutenant Governor in Council shall appoint members of the agency and appoint one member as chairperson and may appoint one vice-chairperson or more.

(2) The Chairperson of every agency, except those agencies which are excluded by schedule to this Act, are deemed to be the Chief Executive officer of the said agency.

(3) Where,

(a) the chairperson is absent or unable to act, a vice-chairperson designated by the chairperson; or

(b) the office of chairperson is vacant, a vice-chairperson designated by the Attorney General

has and shall exercise the jurisdiction and powers of the chairperson including the power to complete any unfinished matter.

(4) The chairperson shall from time to time assign the members of the agency to its various sittings and may change any such assignments at any time and the chairperson may from time to time direct any officer or other member of the staff of the agency to attend any of the sittings of the agency and may prescribe his duties with the agency.

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(5) The opinion of the chairperson upon any question of law shall prevail.

(6) Whether or not the chairperson is a member of the panel which hears a matter to be decided by the agency, he may if he so chooses, take part in the making of the decision as if he has been a member hearing the matter whether or not he has heard all or any of the evidence thereof, so long as there has been a transcript of evidence, and he has read the same.

52. (1) The chairperson of an agency shall appoint from among the members of the agency a committee to establish, monitor and enforce a code of conduct applicable to the members and employees of the agency.

(2) A copy of the code of conduct of the agency shall be filed with the minister responsible for the agency and with the Chairperson of the Management board of Cabinet within six months of the coming into force of this Act.

53. (1) A majority of the members of an agency constitutes a quorum of the agency.

(2) The chairperson may designate one or more persons of the agency to sit as a panel and may direct the panel to conduct any hearing or to authorize any inquiry, investigation or other proceedings that the agency itself could conduct or authorize.

(3) Where the chairperson has designated two or more members to sit as a panel, the chairperson may designate one of the members to act as the chair of the panel and may also determine the quorum of the panel.

(4) The decision of the majority of the members of a panel shall constitute the decision of the panel, and where the number of votes are equal the decision of the chairperson of the panel shall govern.

(5) The decision of the panel shall be the decision of the agency.

(6) If a member of the agency for any reason ceases to be a member, he or she may, with the consent of the chairperson, in connection with any matter in which the member participated as a member of the agency, carry out and complete any duties and responsibilities and exercise any powers that he or she would have had he or she not ceased to be a member of the agency.

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(7) If a member of the agency for any reason is unable to carry out and complete his or her duties, the agency and every panel of which he or she was a member may carry out and complete any duties and responsibilities and exercise any powers that it would have had the member been able to carry out and complete his or her duties.

54. (1) Where an agency conducts a hearing, evidence, submissions, and arguments may be given in either oral or written form, or in mixed oral and written form.

(2) Where an agency conducts a pre-hearing conference, a mediation and conciliation or settlement conference, evidence, submissions, and arguments may be given in either oral or written form or in mixed oral and written form.

(3) Despite Section 10, an agency may, by order, restrict or limit the right of a party to call witnesses and to cross-examine witnesses.

(4) Before an agency makes an order under subsection (3), it shall give the parties an opportunity to make submissions respecting such an order.

55. (1) An agency may direct the parties or their representatives to attend one or more prehearing conferences to consider:

- (a) the possibility of settlement of any or all the issues in the proceedings or proposed proceeding;
  - (b) the formulation and simplification of the issues;
  - (c) obtaining of admissions to facilitate the hearing;
  - (d) disclosure of documents, reports and other evidence prior to the hearing;
  - (e) setting the date for the exchange of documents, particulars and other preliminary materials including fixing the commencement of the hearing;
  - (f) considering what issues and matters will be permitted to be developed during any hearing which may follow;
  - (g) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.
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(2) The chairperson may designate a member or person to preside at a prehearing conference to act for the agency with all the powers of the agency for the purposes of the prehearing conference.

(3) At the conclusion of the prehearing conference, the presiding person may prepare a report setting out the results of the conference which may form a basis for an order of the agency.

(4) An order may be made by the agency under subsection (3) and shall govern the conduct of proceedings unless the agency otherwise orders.

(5) A member of the agency designated to preside at a prehearing conference may participate or preside at any hearing that follows.

(6) At a prehearing conference, the parties to proceedings shall give notice of any preliminary objection, including objections based on the alleged absence of jurisdiction of the agency, or objections based on the alleged bias of its members.

(7) A member or person presiding at a prehearing conference may grant party status to interested persons for the purposes of the prehearing conference and any hearing which may follow, subject to any other disposition which may be made by the panel which presides at any hearing that follows.

56. (1) An agency may, on its own initiative, or at the request of a party, convene a meeting of the parties or their representatives for the purpose of settling any or all of the issues in the proceedings.

(2) The chairperson may designate a member or person to Preside at a settlement conference to act for the agency with all the powers of the agency for the purposes of the settlement conference.

(3) At the conclusion of the conference, the presiding member or person shall prepare a report setting out the results of the conference, and any proposed settlement shall be placed before the agency for confirmation, interim confirmation or rejection by the agency.

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(4) Where an agency rejects a proposed settlement the presiding member or person may reconvene the parties to reconsider the settlement.

(5) Where an agency rejects a settlement, the report and the terms of the proposed settlement shall not be disclosed, and shall not form part of the record of proceedings.

(6) Where an agency confirms a settlement, the settlement shall bind the parties and the agency, and may form the basis for a decision or order of the agency.

(7) An agency may give interim confirmation to a proposed settlement where the agency has determined that in the public interest, public hearings should be held with respect to the proposed settlement.

(8) At the conclusion of the public hearing, the agency may confirm or reject the settlement or make such other decision respecting the proceedings as seems just.

(9) The member or person presiding at the settlement conference shall not participate in any hearing of the proceedings by the agency.

57. (1) An agency may on its own initiative, or at the request of the parties to proceedings, convene a meeting of the parties, or their representatives, to mediate or conciliate the issues in the proceedings.

(2) The chairperson may designate a member or members of the agency, or a person or persons, to preside at a mediation or conciliation conference.

(3) At the conclusion of the conference the presiding member or person may prepare a report setting out the results of the conference for confirmation, interim confirmation, or rejection by the agency.

(4) Where an agency rejects a report the presiding members or person shall reconvene the parties.

(5) Where an agency or a party rejects a report, the report shall not be disclosed, and shall not form part of the record of proceedings.

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- (6) Where an agency confirms a report, the agency may make an interim or final order.
- (7) An agency may give interim confirmation to a proposed report where the agency has determined that in the public interest, public hearings should be held with respect to the proposed report.
- (8) At the conclusion of the public hearing, the agency may confirm or reject the report or make such other decision respecting the proceedings as seems just to the agency.
- (9) The members presiding at a mediation or conciliation conference shall not participate in any hearings of the proceedings by the agency.
58. (1) An agency may, on its own initiative, or at the request of an interested person, and shall at the direction of the Lieutenant Governor, inquire into and hear and determine any matter within its jurisdiction.
- (2) The agency shall give public notice of the proceedings under this section, which notice shall include,
- (a) a statement of the time and nature of the hearing; and,
  - (b) a statement of the statutory authority under which the hearing is to take place, and;
  - (c) a statement of the issues which the agency wishes to consider.
- (3) An agency may conduct a hearing orally or in writing, or mixed oral and written hearings, as it decides is appropriate under the circumstances.
- (4) An agency may retain such counsel and experts as may be required for a full and fair inquiry into the matter to be determined.
- (5) An agency will give interested persons an opportunity to participate in hearings under this section.
- (6) At the conclusion of an inquiry under this section, an agency may issue a policy statement, guideline, order, opinion or decision with respect to the matters considered in the hearing.
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59. (1) An agency may, on its own initiative, or at the request of an interested person, conduct rule making proceedings.
- (2) The agency shall give public notice of proceedings under this section, which notice shall include,
- (a) a statement of the time and nature of the public rule making proceedings;
  - (b) a statement of the statutory authority under which the rule is proposed; and
  - (c) the terms or substance of the proposed rule.
- (3) The agency may conduct oral hearings or written hearings or mixed oral and written hearings under this section.
- (4) An agency may retain such counsel and experts as may be required for a full and fair inquiry in proceedings.
- (5) An agency shall give interested persons an opportunity to participate in proceedings under this section.
- (6) An interested person may apply to the agency for the issuance, amendment or repeal of a rule on such terms and conditions as the agency may determine.
60. (1) Where two or more proceedings are pending before an agency and it appears that
- (a) they have an issue or question of law, fact or policy in common; or,
  - (b) it is in the interest of a just expeditious resolution of proceedings;
- an agency may, of its own motion, or upon the application of a party or other interested person, order that,
- (a) proceedings be consolidated,
  - (b) proceedings be heard at the same time,
  - (c) proceedings be heard one immediately after the other,
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(d) proceedings be stayed until after the determination of any other of them,

(e) evidence adduced in the one shall be applied to the other, or

(f) an order or decision made with respect to one proceedings shall be applied to the other.

(2) An agency may make additional orders respecting the procedure to be followed with respect to proceedings under this section.

(3) For the purposes of this section, an agency may designate a party as the representative of other parties.

61. (1) This section applies to matters where more than one hearing or proceeding is required before more than one agency.

(2) The Lieutenant Governor in Council may, on application by an agency, an interested person, or on his or her own motion, by Order in Council, convene a joint panel composed of members chosen from among the members of the agencies having jurisdiction over the matter and shall appoint a president of the panel from among the members of the panel.

(3) The Order in Council shall set out the nature of the matter to be considered, the procedure to be followed by the joint panel and any other provision to assist in the expeditious resolution of the matter.

(4) A decision of a joint panel shall bind the agencies involved.

62. (1) At any time after the commencement of proceedings, the chairperson may, on his or her own initiative, or at the request of a party, designate a member or other person as case manager of the proceedings.

(2) The case manager of the proceedings shall communicate with the parties and their representatives to consider:

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- (a) the settlement of any or all of the issues;
  - (b) disclosure of evidence;
  - (c) production of expert reports;
  - (d) admissions of fact not in dispute and proof of such facts by affidavit;
  - (e) the times within which disclosure, production and admissions are to made; and
  - (f) such other matters to assist in the just, more expeditious and least expensive disposition of the proceedings.

(3) The case manager shall give directions to the parties with respect to the matters set out in subsection 2.

(4) The directions of the case manager are binding on the parties and in its decision an agency may take in account the adherence of a party to the directions, and, in addition, may assess costs and recover hearing expenses from a party to compensate for its non-compliance with the directions.

(5) The case manager shall file a Report concerning the management of the case at the conclusion of the evidence, or at such other time as directed by the panel.

63. (1) Despite any other Act to the contrary, an agency may, at the request of the Lieutenant Governor in Council, or of its own motion, or upon the application of any party to proceedings before the agency, upon such security being given and upon such terms as directed by the agency, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the agency, is a question of law.

(2) An agency may apply to the Divisional Court for a declaration or order respecting the jurisdiction of the Ombudsman to investigate any case or class of cases under the Ombudsman Act respecting the agency.

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- (3) In matters arising under this section the Divisional Court shall consider,
- i) the purpose served by the agency;
  - ii) the social, economic and other policies administered by the agency;
  - iii) the legislative history of the statutory or other instruments establishing the agency;
  - iv) the effect on the policies and programs administered by the agency of alternate answers to the question of law put to the Court.

(4) The Divisional Court shall hear and determine the stated case and remit it to the agency with the opinion of the Divisional Court for the guidance of the agency.

(5) The agency is entitled has a right to be heard by counsel on the stated case.

(6) Where an agency has stated a case, the agency may proceed on those aspects of the matter not directly affected by the stated case.

(7) The agency and its members are not liable for costs in proceedings under this section.

(8) The opinion of the Divisional Court on a stated case may be appealed to the Court of Appeal, with leave of that Court.

64. The Lieutenant Governor in Council may make regulations respecting the form of oath and solemn affirmation to be administered by agencies.

65. (1) An agency may by order convene and receive evidence from panels composed of two or more persons.

(2) An agency shall not make an order under subsection (1) without giving the parties an opportunity to make submissions.

(3) Where a panel is convened under subsection(1), each member of the panel shall be sworn and qualified individually.

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66. (1) A certified copy of an order made by an agency may be filed in the office of the Registrar of the Supreme Court, whereupon the order shall be dealt with in the same way as a judgment of that court and is enforceable as such.

(2) Any order so filed may be rescinded or varied by an agency at any time in the manner provided in section 77. [Power to Rescind]

(3) An order of any agency requiring a person to pay money, costs, hearing expenses or otherwise, to the agency, to any party to a proceeding before the agency or to any other person as costs or otherwise, may be enforced by a written direction from the agency to the sheriff of any county or district endorsed upon or annexed to a certified copy of the order.

(4) The sheriff receiving such a direction shall levy the amount named therein with his costs and expenses in like manner and with the same power as if the endorsed order were an execution issued out of the Supreme Court against the goods of the person named in the order, and the order so endorsed constitutes a lien and charge upon the property, real or personal, or the interest therein of the person named in the order, that is situate in such county or district to the same extent and in the same manner as the property would be bound by the filing with the sheriff of an execution issued after judgment of the Supreme Court.

(5) Where the person named in any such order holds lands or any interest therein that is registered in a land registry office, the agency may register a certified copy of the order with the proper land registrar, and, when so registered, it constitutes a lien and charge upon the land to the same extent and in the same manner as an execution issued after judgment in the Supreme Court and registered with the proper land registrar.

(6) The amount ordered to be paid by any order registered under subsection (5) may be realized in the same manner and by the same proceedings, with necessary modifications, as the amount of any registered execution of the Supreme Court.

67. (1) An agency may make such orders or give such directions in proceedings as it considers necessary to prevent abuse of its process.

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(2) An agency may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at a hearing, and if any person disobeys or fails to comply with any such order or direction, the agency or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) An agency may by order impose a fine of not more than \$1,000.00 for a first offence and not more than \$10,000.00 for a subsequent offence against a person or persons who have committed contempt in the face of the agency.

(4) In addition to imposing a fine an agency may,

(a) impose restrictions on the continued participation of a person in proceedings, and may exclude a person from further participation in proceedings before the agency until the agency otherwise orders;

(b) order a person to pay expenses incurred by the agency in connection with the contempt.

(5) An order made by an agency under this section shall be enforceable in the manner set out in section 66 [Enforcement of Orders].

(6) An agency shall make an order under subsection 3, only after,

(a) informing the offender of the nature of the contempt and of his or her right to show cause why he or she should not be fined; and,

(b) offering the offender an opportunity to show cause why he or she should not be fined.

(7) Except where in the opinion of the agency it is necessary to deal with the contempt immediately for the preservation of order and control in the hearing room, the agency shall adjourn the contempt proceedings to another day.

(8) An order of contempt made under this section may be appealed to the Divisional Court with leave of that Court.

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(9) An agency may appear by counsel on an application for leave and on an appeal under subsection (8) and is entitled as of right to be heard on an application and an appeal under this section.

(10) An agency and its members and employees shall not be liable for court costs incurred in an appeal under this section.

(11) An appeal from an order of contempt to the Divisional Court does not operate as a stay in the matter except where the Court otherwise orders.

68. (1) Where a party to proceedings before an agency gives an undertaking to the agency or to any person, the agency may monitor the performance of the undertaking and, where a party has failed to adhere to an undertaking, may, by order, order the party to comply with the undertaking.

(2) An order made under this section shall be enforced in the same manner as an order under section 66 [Enforcement of Orders].

(3) An order shall not be made under this section unless the party has been informed of the nature of the breach and has been given an opportunity to show just cause why an order should not be made.

69. (1) In this section, “costs” include legal fees, expert fees, witness fees, fees for the preparation of evidence, travel and accommodation costs, and other expenses incurred by a party directly related to the proceedings.

(2) An agency may, by order, determine the amount of the costs of any proceeding and may order by whom and to whom costs are to be paid.

(3) In making an order under subsection (2) the agency shall consider,

(a) whether the party has or represents a sufficient interest in the outcome of the proceedings; as determined by the agency;

(b) the conduct of the party in the course of the proceedings;

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(c) the contribution of the party to the better understanding of the issues by the agency; and,

(d) whether a party has received a benefit as a result of the proceedings.

(4) An agency may establish a scale under which costs shall be assessed.

(5) An agency may appoint one of its members or employees as an assessment officer.

(6) A decision of the assessment officer may be appealed to the chairperson, who shall have the authority to amend the cost order, upon notice, or to direct any panel of the agency to consider the decision appealed from and confirm the decision or make a fresh decision, which may not be similarly appealed.

(7) For the purposes of this section, costs include legal fees, experts' fees, witness fees, fees for the preparation of evidence, travel and accommodation costs, and other direct expenses incurred by a party to the proceedings.

70. (1) The expenses of an agency incurred in determining any matter may be recovered from any or all of the parties by an expense recovery order made by the agency.

(2) In making an order under subsection (1), an agency shall consider,

(a) whether a party has or represents a substantial interest in the outcome of the proceedings, as determined by the agency;

(b) the conduct of the party in the course of the proceedings;

(c) the contribution of the party to the better understanding of the issues by the agency; and,

(d) whether a benefit has accrued to a party as a result of the proceedings.

(3) In addition to any expenses to be recovered under subsections (1), an agency may make an order respecting the recovery of costs and hearing expenses from a party, or his or her counsel or agent, where the agency determines that the costs and hearing expenses have been needlessly increased due to the conduct of the party, counsel or agent.

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(4) An order under subsection (1) shall not be made without giving an opportunity to the party, counsel or agent to make submissions.

71. (1) Where a person has received a substantial benefit as a direct result of a decision made by an agency and where that person has not participated as a party, an agency may, by order, recover some proportion of the hearing expenses of the agency, in proportion to the value of the actual or potential benefit, deemed by the agency to have been gained by that person.

(2) An order under subsection (1) shall not be made without giving the person affected an opportunity to make submissions.

72. (1) An agency may make interim orders, pending a final order in any proceedings before it.

(2) An agency may, by final order vary, alter or confirm an interim order and may make a final order retroactive to the date of the interim order.

73. An agency shall give any interim or final decision in the form of an order and shall give, in addition to the order, reasons in writing.

74. No proceedings lie against an agency or a member of an agency for anything done, reported or said in the course of the exercise or intended exercise of their functions, unless it is shown that an agency or member of an agency acted in bad faith.

75. (1) Where costs in proceedings are awarded by a court against an agency or a member of an agency, the Crown shall be liable, therefore, as if the award were made against the Crown.

(2) Where costs in proceedings are awarded by a court against a member or employee of an agency, the Crown may recover the amount of the award from the member or employee where the member or employee has acted in bad faith.

76. (1) In making an interim or final order, and in preparing written reasons therefore, an agency member or panel may,

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(a) consult with other members of the agency;

(b) consult with editors and agency employees with respect to technical, scientific and drafting issues; and,

(c) circulate draft reasons to other members of the agency;

(2) Notwithstanding the provisions of the Ombudsman Act and the Freedom of Information and Protection of Privacy Act the notes, working papers and draft decisions and orders of a agency and members of an agency are privileged.

(3) Reports, documents, and other information and material supplied to an agency on a confidential basis are privileged for the purposes of the Ombudsman Act and the Freedom of Information and Protection of Privacy Act.

(4) Where a panel member consults with other agency members, editors and staff, or where draft orders or reasons are circulated, and new arguments or facts, likely to affect the order or decision, arise, the panel shall apprise the parties of the nature of the new arguments and facts and give the parties an opportunity to make submissions.

(5) The opinion of the chairperson on any question of law shall prevail.

77. (1) An agency may, of its own motion, or upon the application of any party or other interested person, at any time and from time to time rehear or review any proceedings before an order is made, and may by order rescind or vary any order or decision made by it.

(2) In considering whether to rehear or review a proceeding or to vary or rescind an order made by it, the agency shall consider:

(a) whether that agency has made a material error of law or fact;

(b) whether material facts exist which were not considered by the agency at the time of the first proceedings;

(c) whether the issues of law or fact are such that the agency might have reached a different decision; and,

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(d) whether any party to proceedings or any other person, who has relied on the decision will be seriously, adversely affected by a revised decision.

(3) Where an agency decides to review or to rehear a decision, the agency shall make orders respecting the scope of the review or rehearing, the issues to be considered and the procedure to govern the review or rehearing.

(4) An agency may award costs and recover hearing expenses incurred on applications for and on review or rehearing proceedings.

78. (1) The Lieutenant Governor in Council may at any time, in his or her discretion, of his or her own motion, vary, or rescind any order, decision, or rule of an agency, and any such order, decision or rule, varied, or rescinded is binding upon the agency and upon the parties to which the order, decision or rule applies.

(2) The Lieutenant Governor in Council at any time, in his or her discretion, of his or her own motion, may direct an agency to review an order, decision or rule, or to rehear a matter in whole or in part, and the Lieutenant Governor in Council may give such direction to the agency respecting the review or rehearing as she or he considers appropriate in the public interest.

79. (1) Notwithstanding the provisions of any other Act of general or special application, no appeal lies from a decision or order of an agency except to the Divisional Court, with the leave of the Court, on questions of law.

(2) An agency is entitled as of right to be heard by counsel on a motion for leave under this section and, where leave is granted, on an appeal under this section.

(3) Notwithstanding the provision of any other Act of general or special application, no appeal *de novo* lies from a decision or order of an agency.

(4) An agency and its members are not liable for costs on applications and appeals under this section.

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80. (1) Notwithstanding any other Act, an agency shall file an annual report upon the affairs of the agency with the Minister responsible for the agency in each fiscal year.

(2) The agency shall make such further reports and provide the Minister with such information as the Minister from time to time requires.

(3) Upon the recommendation of the Chairperson of Management Board of Cabinet the requirement that an agency file an annual report may be waived.

(4) The Lieutenant Governor in Council may make regulations respecting the publication, form and content of annual and other reports to be filed under this section.

81. (1) Subject to subsections (2) and (6), the Lieutenant Governor in Council may, by order, issue to an agency directives of general application on broad policy matters with respect to the purposes and objectives of the agency.

(2) No order may be made under subsection (1) in respect to the legal rights, powers, privileges, immunities, duties or liabilities of any person, or the eligibility of any person to receive, or to the continuation of a benefit or licence, whether or not he or she is legally entitled thereto.

(3) An order made under subsection (1) is binding on the agency commencing on the day the order comes into force and shall, if it so provides, apply with respect to any proceeding pending before the agency on that day.

(4) A copy of an order made under subsection (1) shall be laid before the Legislative Assembly on any of the first fifteen days on which the Legislative Assembly is sitting after the making of the order.

(5) The Lieutenant Governor in Council shall consult with the agency before making an order under subsection (1).

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(6) Where the Lieutenant Governor in Council proposes to make an order under subsection (1),

(a) a copy of the proposed order shall be given to the agency;

(b) notice of the proposed order shall be published in the Gazette;

(c) a copy of the proposed order shall be laid before the Legislative Assembly:

(7) The Lieutenant Governor in Council may, after the expiration of thirty days after a proposed order has been laid before the Legislative Assembly in accordance with subsection (6), implement the proposal by making an order, either in the form proposed or revised in such manner as the Lieutenant Governor in Council deems advisable.

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## APPENDIX 8-2

### HOW TO APPEAL TO THE SOCIAL ASSISTANCE REVIEW BOARD

**General Welfare Assistance • Family Benefits • Vocational Rehabilitation Services • Co-payment under the Health Insurance Act**

#### INTRODUCTION

If a municipal or the provincial government makes a decision about your social assistance with which you do not agree, you have the right to appeal to the Social Assistance Review Board.

#### WHAT IS THE SOCIAL ASSISTANCE REVIEW BOARD?

The Social Assistance Review Board is an independent group of people appointed to review the decisions of General Welfare administrators and Family Benefits directors.

#### WHAT CAN I APPEAL?

You can appeal the refusal to grant a benefit, the suspension or cancellation of a benefit, the reduction of a benefit, or the amount of benefit under the following Acts: the *Family Benefits Act*, the *General Welfare Assistance Act*, and the *Vocational Rehabilitation Services Act*. You cannot appeal items of special assistance or supplementary assistance under the *General Welfare Assistance Act*, and allowances granted under Order-in-Council under the *Family Benefits Act* are not appealable to the Social Assistance Review Board.

#### HOW DO I APPEAL?

Request a hearing by the Social Assistance Review Board, using Form 1. These are available from municipal and provincial social services offices, or you may telephone or write to the Board:

Social Assistance Review Board

Room M1-56, Queen's Park, Toronto, Ontario M7A 1E9

Telephone: (416) 965-2363 **Toll-free outside Toronto: 1-800-387-5655**

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You must send the Notice of Request for Hearing (Form 1) to the Board within 30 days of receiving the decision of the provincial director or of the municipal administrator.

## **AM I ENTITLED TO BENEFITS WHILE I APPEAL?**

There is no automatic entitlement to benefits but you may request temporary financial assistance while waiting for a hearing if you can satisfy the Board that there will be hardship. You must ask for this on your Form 1 when you submit it to the Social Assistance Review Board or you may telephone the Board to make your request.

## **ENGLISH OR FRENCH?**

The Social Assistance Review Board hearings are held either in English or French: it is your choice.

If English or French is not your first language and you feel you will need the help of an interpreter at the hearing, you may ask the Social Assistance Review Board to provide an interpreter or you can bring your own interpreter. This may be a friend or relative.

**The general manager of the Board must be notified of your language preference as soon as possible, preferably on your Notice of Request for Hearing (Form 1).**

## **PREPARATION FOR THE HEARING**

Upon receipt of your Form 1 the Board will immediately send an acknowledgement letter. This will be followed within four (4) weeks by a Notice of Hearing which will tell you where the hearing will be held, the date and the time.

The Board will also notify the municipal or provincial social services administrator/director of your appeal and request a report explaining his/her decision.

Please note that if a written report is submitted to the Board you will receive a copy. The report is for your use at your appeal hearing only, and you will be given an opportunity to comment on it at that time.

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**It is your responsibility to make your case before the Board. If you do not attend or send somebody to represent you, your side of the case will not be held and you will likely lose your appeal.**

## **DOCUMENTS**

If you want the Board members to look at a medical report or any other document about your case, be sure to bring it with you to the hearing. The Board is an independent appeal body and *does not* have your family benefits file or any municipal welfare file. ***Remember,*** the Board members do not see the reports you may have already sent to the province or municipality.

## **WITNESSES**

If you believe that a witness or witnesses will help your appeal, you should ask them to attend. If you bring a friend or a relative along for support, they too are welcome.

## **LEGAL HELP**

You may obtain legal help to prepare your case and to assist you at the hearing. Legal assistance is often available at social action centres, community legal clinics, welfare advocacy groups and law school “storefront” offices; or you may be eligible for Legal Aid. Your local office is listed in the phone book under Legal Aid.

## **WHERE WILL THE HEARING BE HELD?**

The Board holds hearings across the province and, if necessary, in the home of the person asking for the hearing.

## **NOTE:**

*If special travelling expenses are necessary, you may apply to the Board for reimbursement.*

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## **WHAT HAPPENS AT THE HEARING?**

Your hearing will be convened by the presiding Board member who will chair the hearing and who will usually be assisted by one or two members of the Board.

The hearing is not open to the general public so that your privacy is protected.

The Board members will review your Notice of Request for Hearing (Form 1) and the report of the municipal social services administrator or the provincial director. You will have the opportunity to present your case. The Board members will ask questions in order to clarify the information set before them by either yourself or the municipal administrator/provincial director.

## **WHAT HAPPENS AFTER THE HEARING?**

The Board's decision will be made after the hearing. A written Notice of Decision will be mailed to you after the hearing. You will get one copy; the provincial director or the municipal administrator of social services also receives a copy.

## **FURTHER ACTION AFTER RECEIVING YOUR DECISION FROM THE BOARD**

You may:

1. Ask for reconsideration by completing a Form 2 (Notice of Application and Variation) and sending it to the Board within 30 days of the date you receive the Delivery Notice, which is attached to the Notice of Decision.
2. Serve notice within 30 days of receiving the Board's decision that you are taking the matter to the Divisional Court of the Supreme Court of Ontario.

It would be advisable to have a lawyer assist you in taking this step.

Any decision of the Social Assistance Review Board is appealable to the Divisional Court of the Supreme Court of Ontario.

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The information in this pamphlet is in summary form for guidance and convenience. It cannot serve as final interpretation of legislation.

**Joanne Campbell, Chair**  
**Social Assistance Review Board**  
**Room M1-56**  
**Queen's Park**  
**Toronto, Ontario**  
**M7A 1E9**  
**Telephone: (416) 965-2363**  
**Toll-free outside Toronto: 1-800-387-5655**

Ce dépliant est également disponible en français.

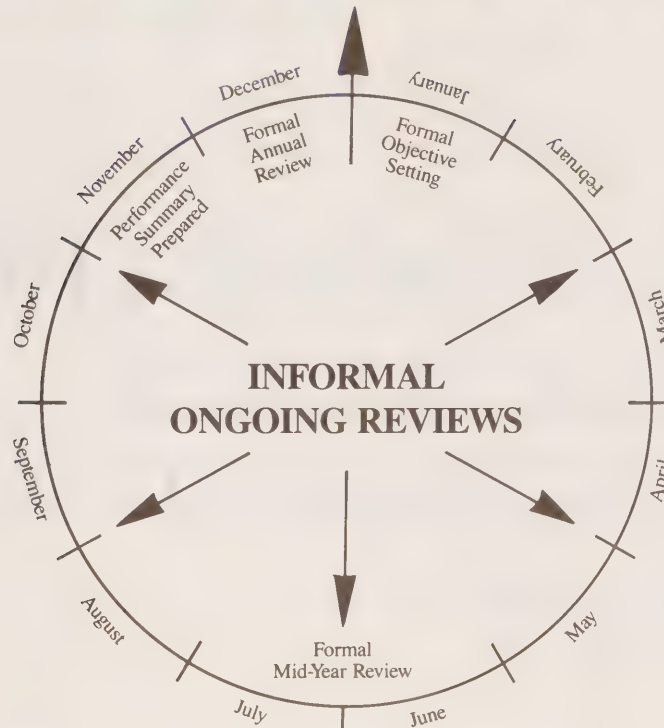
For details about social assistance programs, contact the nearest office of the Ontario Ministry of Community and Social Services. Ask for a copy of the booklet **Income Maintenance Handbook**. (See government listings in your telephone book — usually in the blue pages at the back of the directory.)

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## APPENDIX 8-3

### DM PERFORMANCE MANAGEMENT AND REVIEW CYCLE

#### ANNIVERSARY DATE PERFORMANCE PAY AWARDED



#### OCT/NOV '88

- Premier announces Key Leadership Thrusts for 1989
- Premier states policy and administration criteria to DMs
- Throughout Nov. DMs review own contracts/past cycle 1/88-12/88 in preparation for meeting with Secretary of Cabinet
  - Assoc. Sec of Cabinet collects input for Secretary of Cabinet and Premier's Assessment.
- DMs identify work objectives and prepare performance contracts for next cycle 1/1/89 - 31/12/89

#### DEC '88/JAN '89

- Secretary of Cabinet meets with all DMs to review past cycle and reach agreement on objectives for next cycle
- Secretary of Cabinet meets with Premier to review past DM performance cycle & objectives for next cycle

#### JAN '89

- Pay for Performance awarded (Note: this will cover pay period January 1/88 to December 31/88)
- 1989 Performance cycle begins

#### JAN/FEB '89

- 1989 Performance Agreement approved

#### JUL '89

- Mid-Year Performance Review



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# DEPUTY MINISTERS' PERFORMANCE MANAGEMENT SYSTEM

Office for Executive Resources  
November 3, 1988

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## I. PRINCIPLES

The principles of the Deputy Minister Performance Management System are as follows:

- The system is based on an annual performance agreement which reflects individual targets and objectives. These are agreed to by the deputy minister, the Secretary of Cabinet, the minister, and the Premier.
- Although objectives and targets reflect the uniqueness of each deputy minister's job, they also address the Premier's key leadership thrusts for 1989 which are relevant for all deputy minister positions.
- Deputy minister compensation is to be determined annually according to the deputy minister's performance for the previous year.
- The performance appraisal cycle is an annual process which includes planning and objective setting at the beginning of the year, feedback and a mid-term review and a formal assessment interview at the end of the year.
- The criteria by which deputy ministers are rated signal the corporate values to the rest of the ministry.

## II. THE POLICY

Briefly stated, the policy on performance appraisal is as follows:

- Each deputy minister is responsible for drafting a performance agreement in the form of a letter to the Secretary of Cabinet. This letter must be reviewed with the minister to ensure that the minister's objectives have been addressed.
  - The content of the performance agreement is agreed to by the Premier. The content addresses goals and targets which reflect:
    - government priorities as stated by the Premier and the minister
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- ministry priorities and operational objectives
  - personal goals for job development, and
  - the key leadership thrusts which are applicable to all deputy ministers
  - Each deputy minister must complete a performance agreement, which is kept on file in the Cabinet Office, in order to be awarded performance pay at the end of the year.
  - Performance is assessed by the deputy minister, the minister, the Secretary of Cabinet and the Premier.
  - Performance pay will be allocated by the Premier, based on five performance ratings: exceptional, superior, commendable, developmental/needs improvement, and unsatisfactory.

### **III. THE PROCESS**

#### **A. SETTING OBJECTIVES**

##### **OCTOBER/NOVEMBER:**

The Premier outlines the key leadership thrusts of his government (see page 5).

##### **NOVEMBER/DECEMBER:**

Deputy ministers solicit input from their ministers and prepared a letter to the Secretary of Cabinet outlining key performance objectives, addressing government priorities, ministry priorities and operational objectives, personal goals for job development and the key leadership thrusts.

##### **DECEMBER/JANUARY:**

The Secretary of Cabinet meets with each deputy minister to agree to a performance agreement for the upcoming year. (This meeting is also the one in which last year's objectives are reviewed and assessed, where timing permits.)

##### **JANUARY/FEBRUARY:**

1989 Performance Agreement approved.

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## **B. MID-TERM REVIEW**

This mid-term discussion is between the deputy minister and the Secretary of Cabinet and is the vehicle for assessing the achievement of completed goals and adjusting priorities where necessary.

This phase is particularly important where:

- there is a change in circumstances to warrant a change to the performance contract
- the deputy minister moves to another portfolio
- the government or ministry priorities changes significantly
- there is a change in minister
- performance improvements are desirable

## **C. REVIEW AND ASSESSMENT**

This phase is the completion of the annual performance cycle, at which time the contents of the performance agreement are reviewed against achievements. The process is as follows:

### **NOVEMBER/DECEMBER:**

The Associate Secretary of Cabinet meets with each minister to compile his/her comments on the performance of the deputy minister for input to the Secretary of Cabinet and the Premier.

Input from the Chairman of Management Board, the Treasurer, and central agency deputy ministers will be taken into account for assessment. If the deputy has had a management review by Management Board that year, the information will also be taken into account.

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Each deputy meets with the Secretary of Cabinet to discuss the achievement of goals. The Secretary of Cabinet discusses his/her assessment of the deputy minister's performance with the deputy minister. At this time, they may also agree on the contract for the following year.

The outcome of the assessment discussion is documented in a summary letter.

#### DECEMBER/JANUARY:

Because the performance agreement and the assessment of individual performance determines a pay increase, each deputy minister will be given a performance-level assessment in terms of overall performance and contribution to the public service.

### D. THE PERFORMANCE RATING

The overall contribution and performance of deputy ministers will be determined by the Premier.

Each deputy minister will know his/her own performance rating.

The rating scale is the following:

Exceptional	• significantly exceeded all objectives and standards of performance
Superior	• consistently met and frequently exceeded objectives and standards of performance
Commendable	• met overall objectives and standards of performance
Developmental/ Needs Improvement	• met some objectives - with further development, likely to meet overall standards of performance
Unsatisfactory	• did not meet objectives. Requires significant improvement to achieve overall objectives

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## KEY LEADERSHIP THRUSTS - 1989

### A. MAJOR THEMES FOR THE GOVERNMENT OF ONTARIO

1. A Growing and Competitive Economy with Opportunities for All.  
**A sophisticated and rapidly changing technological environment**
  - confront globalization - becoming internationally competitive
  - diversity beyond resource-based economy
  - premium on entrepreneurship
  - skilled work force in quality jobs
  - affordable housing
2. A Clean, Healthy and Safe Ontario.  
**Our future as individuals and as a society**
  - protect the environment (clean water, air, safe disposal of waste material)
  - wellness and assured quality health care
  - safety in the work place
  - support of the family
  - safety on the streets
3. Developing our Human Resources through Quality Education and Skills Training.  
**Educational Relevance**
  - create sound, educational foundation, literacy skills, basic learning skills
  - entrepreneurial skills
  - life skills (i.e., drugs, wellness theme)
  - technical training/retraining opportunities matching changing market place
  - sound basis for lifelong learning
  - pride of place - respect for new face of Ontario

### B. ADMINISTRATIVE PRIORITIES

1. **Support for the Minister**
    - anticipation of issues in public area, legislature
    - issues management/no surprises
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- quality of advice
  - generation of ideas to support minister's agenda
  - encourage climate where minister can work effectively with staff

## **2. Communications and Public Issues Management**

- work closely with the public and other sectors promoting open government, testing ideas and explaining decisions
- ensure communications sensitivity exists throughout the ministries
- improve communications capability and promote customer service initiatives with the general public, clients, interest groups and the business community

## **3. Human Resources Management**

- motivate all parts of the organization to examine new ways of doing things
- promote internal staff development to deal with new challenges and ensure development of future leaders
- provide opportunities and initiatives in support of women, francophones, minorities, aboriginals and the handicapped
- provide climate where staff are involved, understand goals, and feel recognized and rewarded

## **4. Financial and Program Management**

- appreciate constraint efforts and re-think programs, do not just pare down
- review internal ways of doing business and consider new approaches to providing more cost-effective service
- identify major programs where review is necessary

## **5. Cross-ministry Policy Development**

- encouragement of cross-ministry policy development, not just consultation
- contribution to major government policies
- long-term, broad strategic direction

## **6. Leadership**

- instil in the organization a receptiveness and enthusiasm for examining new ways of doing business
  - look for leaders to be team-builders, decision-makers, deliverers and communicators within a tight financial framework
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## EXECUTIVE SKILLS PROFILE

This is a profile of the skills, abilities and attributes generally required of an executive in the Ontario Public Service.

Note: Executive in this context is defined as the incumbent of a position classified in the Executive Compensation Plan.

The profile is based on five major responsibilities which can be found, more or less in every executive job.

Because of the variety and scope of executive jobs in the Ontario Public Service the responsibilities are couched in broad and general terms which may have different connotations in different Ministries.

These are general responsibilities and are not of equal weight, importance or emphasis in any group of executive jobs.

Many executives do not provide “service to the public” directly. They do however serve “a public” of clients, interest groups, people or communities. Hence “service to the public” is meant in the broadest sense.

Similarly not every executive job has a heavy “policy or standards development” component. What a job lacks in one or more of the responsibilities will be more than made up for in others.

Finally, the skills that are required in any one executive job must be based on the specific responsibilities required in the job as it is to be performed at any specific point in time, depending on the role the executive must play.

At one point in time the job may require an innovator and entrepreneur. At another time it may require a developer, a caretaker or a superb administrator. In short, each job requires a specific type of person or personality with a specific mix in skills.

So not all skills will be needed for all positions. Neither will they be needed in the same quantities, or levels or degrees, or in the same mix.

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How the job will be performed will depend in part on the job itself, the incumbent, the boss, as well as subordinates in the unit.

Generally the more senior jobs will require a higher level or degree of the skills and often a much different combination of skills than lower level positions.

## **THE FIVE MAJOR RESPONSIBILITIES OF AN EXECUTIVE**

1. Policy and standards development, co-ordination and implementation.
2. Program development and co-ordination.
3. Program delivery and service to the public.
4. Managing the organizational unit.
5. Corporate responsibilities and citizenship.

## **O.P.S. EXECUTIVE SKILLS AND ATTRIBUTES**

The skills and abilities required of an executive in the O.P.S. are broken down into the following arbitrarily chosen Categories or Skill Sets.

1. Technical/Professional
  2. Communication
  3. Interpersonal
  4. Judgement
  5. Leadership
  6. Management
  7. Political Sensitivity and Awareness
- 
1. **Technical or Professional Skills**

The professional or technical skills directly related to the functions and responsibilities of the unit of organization and which are required in the executive, e.g. legal, medical, engineering, finance, accounting, personnel, systems, computer, forestry, economics, etc.
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The absence of the technical or professional skill in the executive would fundamentally change the nature and content of the job.

**2. Communications**

- listen effectively
- hear and understand
- question carefully
- think critically, analytically, strategically and conceptually
- speak persuasively, articulately and concisely
- write competently
- actively seeks participation of clients/public

**3. Interpersonal**

- relates well to staff, peers, superiors, clients, and publics
- sensitivity
- personal credibility
- effectively balances competing interests
- honesty and integrity
- trustworthy and inspires trust
- self-confidence

**4. Judgement**

- high ethical and moral standards
- responsible and accountable
- a service attitude and a desire to serve
- provide consistent, competent advice
- adaptable and flexible
- intelligence and common sense
- make the right decisions in a timely manner

**5. Leadership**

- action oriented - decisive
  - self-starter, well motivated
  - energy, enthusiasm and stamina
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- manage change confidently and competently
  - positive outlook and manner
  - creative and innovative
  - tough-minded, fair
  - goal and objectives oriented
  - results oriented
  - good role model for staff
  - vision and ability to communicate it

## **6. Management**

- plan, organize, direct, control
- delegates - follows up and holds staff accountable
- team player, team builder
- manages performance
- gets results through others effectively and efficiently
- develops staff
- has a participative management style, encourages participation
- develops necessary reporting systems and managerial controls for effectiveness and efficiency
- knows what is going on in unit
- sets high standards for self and unit

## **7. Political Sensitivity and Awareness**

- apolitical and nonpartisan
  - sensitive to broader environment
  - follows Ministry and government policy and direction
  - keeps superiors informed
  - can react quickly, positively and enthusiastically to changes in policy and direction
  - initiative and flexibility
  - courage - not afraid to express an unpopular opinion or position
  - tact and diplomacy
  - open to other views and opinions
  - able to deal with ambiguity and to establish program direction from indistinct, ambiguous messages
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## CHAPTER 9

### INCREASED STATUTORY POWERS

#### 9.0 INTRODUCTION

This Chapter outlines various powers which I believe should be available to all 91 agencies covered by this Report. Certain agencies could be excluded from the operation of numbered sections in a schedule by an OIC after consultation between the Government, the Council, the Ministries and individual agencies. The effect of the amendments to follow would be that the agency is included unless it is excluded.

The underlying foundation to the *Statutory Powers Procedure Act (SPPA)*, was the legal perception emanating from the McRuer Report in the late 1960's. As discussed in Chapter Four, the McRuer Report was the subject of a great deal of criticism from the moment of its publication. The major criticisms of the Report, as it dealt with agencies and judicial review, were that it was too narrow and judicialized the process to the disadvantage of the participating public.

The major difficulty I have always had with the McRuer Report is its unfamiliarity with the agency universe; why agencies exist; how they operate; why they can not operate like courts; what powers they require and what procedures they must employ. The thrust of the Report was to judicialize the practice and procedures of agencies, and to leave judges, the profession, politicians, the potential parties, the media and the participating public with the expectation that the agencies would manage their affairs in a court-like fashion.

Judicialization of agencies is not in the best interests of the public.

The chasm between expectations and reality, creates serious problems in understanding the role, operations and decisions of agencies. A basic premise of my Report is that the operation of administrative agencies is a whole subject, and that pieces cannot be weighed and dealt with in isolation. The major influence running through the McRuer Report is its acceptance of Dicey and the "Rule of Law", which makes judicial intervention not only



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worthwhile but likely. The function, the efficacy, the monetary value, the ability to respond quickly, the ability to mass adjudicate, grant timely relief, make policy, make rates, settlements, conciliation and mediation were hardly, if at all, addressed overtly or covertly by McRuer. But to my mind, the worst failing of McRuer was his assumption that by protecting the individual, the courts would thereby protect society.

This Report describes agencies and the need for agencies to get out from under the magnetic field of judicial views and practices. It includes some further analysis of “curial deference” and judicial review.

I remind the reader that most Canadians agree that the law should be updated continually as many laws do not reflect the changing standards of society. I am not alone when I state that agencies must be given greater flexibility and a broader scope to respond to and improve the service and delivery system delegated to the agencies by the Legislature. To this end, I make a number of recommendations that update, but are not radical or untested.

As I pointed out earlier in this Report, when the wave of agencies began in Ontario in the 1950’s and the 1960’s, there was an underlying confidence that the procedures of the courts would serve as good models for agencies. This has not turned out to be true for three reasons.

- (i) The courts have often shown a reluctance to accept agency procedures, unless those procedures are practised in the courts even though the agency procedures may be deemed necessary by the agency for the proper implementation of the agency’s mandate. Professor Arthurs stated:

“It is relatively rare for a judge to explore, or defer to, accepted administrative interpretations, or to seek to inform himself of the general context and operation of a statute before applying it.” –  
*Rethinking Administrative Law: A Slightly Dicey Business*. 17 Osgoode Hall L.J. at 18.

- (ii) The courts have demonstrated their inability or unwillingness, to reform themselves in order to cope with mass adjudication and have shown a reluctance

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to accept public participation or input into court proceedings. In fact, the courts have developed even for their own hearings, barriers to open public participation, with their rules on standing, justiciable issues and a sufficiency of interest. These court standards and procedures are unacceptable for administrative agencies in an open society. This is particularly relevant when one recalls that most agencies were created to get away from the courts and their confining procedures.

- (iii) The courts themselves have been critical of their own management of their own resources. As Justice Zuber stated in his *Report of the Ontario Courts Inquiry*: (at para 7.17 citing Millar and Baar, *Judicial Administration in Canada*) the justice system

“...is a ramshackle and outmoded conglomerate...a fractured mosaic of individual fiefdoms which has grown historically in response to immediate needs, short-term planning, political and budgetary expediences ....and from the inexpressible mores of a legal subculture bequeathed over the centuries and unconsciously imprinted on modern attitudes.”

Those words hardly describe a “role model” for agencies.

Because agencies cannot rest their practice and procedure solely upon court procedures, nor depend solely for their needs upon the *SPPA* drafted more than 15 years ago, I propose that changes be introduced to the *SPPA*, which would apply to all 91 agencies. The exception would be those agencies removed from the ambit of a part or whole of the *SPPA* by schedule, which can easily be accomplished by an Order-in-Council (OIC).

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## 9.1 INTERPRETATION

In setting forth the amendments to the *SPPA* which follow in this Chapter, I would observe that I have tried to balance specificity with generality. I have attempted to be as specific as possible where specificity is desirable. Where matters are better left to the discretion of an agency, I have used general language.

There are many ways of reading a statute or an amendment to a statute, but the two extremes are to read the statute liberally or to read the statute restrictively. In reading a statute “liberally”, the reader will read the statute in order to achieve the broad social and economic purpose underlying the statute. An example of a “liberal” interpretation of the *Worker’s Compensation Act* would be to read the statute so as to give the widest form of relief or benefit to the workman who has been injured, in that he has no other possible avenue of help. An example of a restrictive reading of a statute would be where someone is charged under the *Criminal Code*. Where an individual’s freedom is involved, the state can limit that freedom only by the clearest and most restrictive interpretation of the statute.

The amendments which I am about to propose should be read liberally to ensure that the matters to which they relate are disposed of inexpensively, expeditiously, fairly and in the public interest. My first proposed amendment deals with the approach that the courts and others should take in interpreting these sections. The amendment is borrowed from the interpretation section of the *Rules of Practice* of the Supreme Court of Ontario.

## INTERPRETATION

**48 — This Act shall be liberally construed to secure the just, most expeditious and least expensive determination of every proceeding governed by this Act.**

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## 9.2 JUDICIAL DEFERENCE

The companion piece to this type of provision is a statutory requirement that judges defer to those decisions of agencies which are not “patently unreasonable”. I have set out proposed wording with a discussion of the underlying reasons in this chapter under “Judicial Review”; however, I repeat the provision here to assist the reader.

**49 — (1) The agency has jurisdiction to exercise the powers conferred upon it by this Act and to determine all questions of fact or law that arise in any matter before it, unless such determination is patently unreasonable, or unless the process whereby the agency makes its determination is not provided for by its mandating statute, or is manifestly unfair.**

**(2) In determining whether a decision of an agency is patently unreasonable, the court shall consider,**

- i) the purpose served by the agency,**
- ii) the social, economic and other policies administered by the agency,**
- iii) the legislative history of the statutory or other instrument establishing the agency,**
- iv) the effect on the policies and programs administered by the agency of alternate interpretations of the agency’s mandating legislation.**

The reader will note that the balance of this Chapter addresses a number of specific subjects. First, a description of the subject matter, following which there is a proposed amendment to the *SPPA* dealing with the subject just described. The subjects are discussed in the approximate order in which they would arise in the course of a hearing.



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## 9.3 AUTHORITY TO ESTABLISH RULES OF PROCEDURE

Only a few agencies have published rules of procedure for a hearing to guide agency members, counsel who may appear for parties, the parties themselves or the public who attend and may want to participate. Familiarity with such rules is also important for the agency staff who take part in the hearing and for witnesses. The presence, absence or quality of the rules will clearly indicate to an observer, (and to a court on review) the level of professionalism and expertise of an agency.

At present, section 28 of the *SPPA* requires that agencies submit their proposed rules of procedure to the Statutory Powers Procedure Rules Committee. This committee is made up of the Deputy Attorney General, the Chairperson of the Ontario Law Reform Commission, a judge of the Supreme Court, a senior official in the public service of Ontario who is or has been a member of a tribunal, a member of the Law Society of Upper Canada, a representative of the public who is not a member of the public service of Ontario, and a professor of administrative law on the law faculty of a university in Ontario. All are appointed by the Lieutenant Governor in Council.

The committee's purpose is to approve and to monitor agency rules. However, only a handful of agencies in recent years have submitted their rules to the Rules Committee as required by the *SPPA* (and only 11 of the 91 have ever submitted rules for approval in the last 18 years). More recent agency legislation tends to exclude the *SPPA* with respect to the power of the agency to make its own rules. This may also explain why there are so few rules submitted to the Rules Committee.

An agency has only the powers which are expressed or implied in the statute by which the agency was created. A court will imply a power if it can be shown to be necessary to carry out a function that is expressly given to an agency. When an agency is holding hearings in order to make a determination of some issue properly before it there must be implied some power to control its own proceedings. The fine question will be whether the agency has the power, express or implied, to proceed as it has. The courts have generally held that not only is the agency itself the best judge of the need, but that it must be given a broad scope to control its own proceedings within the ambit of the statutory power given to it.

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Section 28 of the *SPPA* provides:

“(28) No rule of procedure to govern the proceedings of a tribunal to which Part 1 applies shall be made or approved except after consultation with the [Statutory Powers Procedure Rules] Committee.”

The clear English meaning of this section is neither obtainable or obtained in practice. In any hearing, most agencies make several or several dozen rules to govern that hearing as matters arise. It would be impossible to consult with the Committee before each is made. Yet there can be no consistency of procedure if rulings are not rules which create procedural precedents. Thus, it must be obvious that there was a difference in the mind of the authors of the Act between a “rule of procedure” and “a ruling on procedure” made as a case proceeds. In the latter, the agency must be able to make rulings on procedure itself or many hearings would grind to a halt.

It would be useful to make it clear in an amended *SPPA* that there is such a difference and that the latter is within the competence of the agency during or leading up to a hearing. Many agencies possess a power such as that found in the *Ontario Municipal Board Act*, RSO 1980, c. 347:

“90. The Board may make general rules regulating its practice and procedure.”

Every agency which holds public hearings should have current published rules of procedure, so that those taking part in the hearing will know how to proceed. This will also ensure that there is an even-handedness and predictability in the handling of matters as they proceed before Ontario agencies.

I have heard it said that it is difficult to prepare general rules for all agencies, but that is not so. In terms of procedures, all agency hearings have about a 70% aspect in common. The common part of agency hearings can and should be reduced to a model set of rules, which would become Part One of the rules, to be followed by Part Two, the section which is particular to each specific agency, where there are differences.

Before any agency adopts the model, it must carefully consider if there are some parts

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which should be modified or omitted, and whether there are some additions that should be made that have not been included in the model. I believe that a Rules Committee of the Council, together with the agencies themselves, would be in the best position to decide what kind of provisions are required for the rules of each agency.

Model rules of procedure would be ideally prepared by the Council in association with the agencies, to come into effect for every agency covered by the amended *SPPA* on a fixed date, unless before that date, an agency has put into effect, rules of procedure approved by the Council. Such a model could be replaced as the agency establishes its own rules, subject to the approval of the Council.

The model rules would be circulated immediately by the Council to all agencies and ministries for comment. Once the model had reached a form acceptable to the new Committee, it would be presented to the Council for approval. The model would, as approved by the Council, then be binding upon all agencies, unless and to the extent that they are modified with the approval of the Council. The model rules would be published in English and French and be gazetted.

It should not be necessary to have the rules of an agency approved by Order-in-Council as is now the requirement by some mandating legislation. I propose an amendment to the *SPPA* which would amend the statutes of all agencies covered by the amendment to the effect that the amendment to the *SPPA* relative to rules of procedure shall prevail over all other statutes to the contrary.

It is important that the provision for changing the rules be flexible so that each agency can make suitable changes. However, it is equally important that each agency have rules and that the Council ensures that the rules are in place. The fact that there is a set of rules of procedure adopted by or for an agency would not preclude the agency from making rulings on procedure on a case by case basis as needed from time to time, including the authority to suspend a particular rule in a particular case.

The role of the Council is not to interfere with the internal operations of any ministry or agency. However, a member of the public should be able to go from one agency to another

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without having to hire for each agency a specialized lawyer to deal with a new maze of different operating rules. Fairness and equity have some very common characteristics, which all agencies in their rules and hearing process, should stipulate and observe.

It is clear from any reading of the case law of Ontario that the procedural rules of the *SPPA* have not been broad enough to cover even basic requirements and that some agencies have felt the necessity to create their own rules of procedure. Only a few of the administrative agencies have rules in place, which were submitted to the Rules Committee, and there is no coordination for even the common provisions for hearings before agencies. This is not helpful to the public which may wish to take part in agency hearings. To provide a public forum is the cardinal reason why agencies were created. Every reasonable step should therefore be taken to facilitate ease of public participation. Readily available, common-sense rules will go a long way to realize that goal.

## **RULES OF PROCEDURE**

**50 — (1) This section applies despite any other statute or regulation governing rules of procedure as adapted by or applicable to all agencies listed in Schedule 1 to the SPPA.**

**(2) Within six months from the coming into force of this Act, the Council shall prepare model rules of procedure.**

**(3) The model rules of procedure shall apply to all proceedings of agencies listed in Schedule I.**

**(4) No rules of procedure other than the model rules of procedure shall be adopted or followed by an agency unless the rule has been approved by the Council.**

**(5) Nothing in this section is to prevent an agency from making a ruling for the purposes of a particular case.**

**(6) Rules made in accordance with this section shall be published in the Official Gazette and made available to the public in English and French.**



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## 94 QUORUMS AND THE SIZE OF PANELS

The mandating legislation dealing with the size of panels and the quorum of an agency varies greatly from one, two, and three to a majority of the agency, providing in the latter case that it may not be less than a minimum number. The rationale for the differences in the legislation is not readily apparent.

I recommend legislation to enable panel sizes of hearing agencies to vary with the need of the agency members themselves. Some members do not have sufficient experience or the *je ne sais quoi* to sit alone, but others unquestionably do. My own experience shows that, except on an appeal, a decision can be made just as well by one member, and often better made by one member, than three. One member panels do not involve dissents. An agency can double its output by using panels of one as opposed to two or three. Panels of one are far more economic than panels of two or three. There is no firm evidence that panels of two or three make better decisions than panels of one, particularly if the agency has the authority to circulate its decisions amongst its members for comment. One member panels may require, for consistency, that the decisions be reviewable internally by the agency.

Most agency legislation provides for panels of two or three members. However, some agencies are so structured that panels may have constituent representation whereas others will have a cross-section of expertise. Constituent panels (e.g. labour panels) may have to have three members.

Generally speaking, the Chairperson is in the best position to select the size and personnel of the panel, based on his or her knowledge of the issues and competence of the members. To legislate the size of panels is, in my opinion, unwise. For example, at present, the Rent Review Hearings Board must sit three members on a panel. This is very wasteful of time and resources. This Board is an excellent example of a mass adjudication agency which ought to be free to use conciliators, mediators, and hearing officers, rather than or at least in addition to, formal hearing panels.

I recommend, except where an agency is excluded by a Schedule to *SPPA*, that one person or such other number, as selected by the Chairperson, shall constitute a quorum,

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notwithstanding the provisions of any other Act.

I also recommend that agencies should have the authority to sit a single hearing officer, who shall have the authority to report or make recommendations to the agency. The agency will in turn have the power to issue an order amending or giving effect to the hearing officer's report or recommendation.

Agencies in Ontario, as well, ought to be authorized to engage in the modern methods of dispute resolution such as conciliation, mediation, settlement conferences, generic hearings and the like. These kind of techniques are best conducted by one person on behalf of the agency.

When agencies sit on appeals from first instance deciders, they should sit panels of three. Likewise, the quorum should be three when an agency has decided to rehear or review a matter.

The amendment also provides that where a panel of two or more persons has been chosen, if one member of the panel is unable to participate fully in completing the decision, due to death or disability or other cause, a decision made by the remaining member or members is valid. This provision is intended to eliminate the unnecessary delay and expense of fresh hearings where the quorum can not continue due to reasons beyond the control of the panel.

## **QUORUMS AND SIZE OF PANELS**

**53 — (1) A majority of the members of an agency constitutes a quorum of the agency.**

**(2) The chairperson may designate one or more persons of the agency to sit as a panel and may direct the panel to conduct any hearing or to authorize any inquiry, investigation or other proceedings that the agency itself could conduct or authorize.**

**(3) Where the chairperson has designated two or more members to sit as a**

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panel, the chairperson may designate one of the members to act as the chair of the panel and may also determine the quorum of the panel.

(4) The decision of the majority of the members of a panel shall constitute the decision of the panel, and where the number of votes are equal the decision of the chairperson of the panel shall govern.

(5) The decision of the panel shall be the decision of the agency.

(6) If a member of the agency for any reason ceases to be a member, he or she may, with the consent of the chairperson, in connection with any matter in which the member participated as a member of the agency, carry out and complete any duties and responsibilities and exercise any powers that he or she would have had he or she not ceased to be a member of the agency.

(7) If a member of the agency for any reason is unable to carry out and complete his or her duties, the agency and every panel of which he or she was a member may carry out and complete any duties and responsibilities and exercise any powers that it would have had the member been able to carry out and complete his or her duties.

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## 9.5 ORAL AND PAPER HEARINGS

The *SPPA* envisages public oral hearings. This requirement is not only unduly restrictive and out of date, but conflicts with the mandating legislation of some of the agencies. Where there is conflict, the specific legislation of the agency prevails over the general legislation of the *SPPA* (see *Craies on Statute Law or Statutory Interpretation* by F.A.R. Bennion).

Some agency legislation refers to “hearings” and some to “public hearings”, whereas the *SPPA* frequently uses the word “hearing” without qualifying it with an adjective, such as “public”, “oral”, or otherwise.

What the *SPPA* does not seem to contemplate are paper hearings (i.e. hearings in which the arguments are presented on paper rather than orally) or hearings which may include a myriad of other structures using conciliators or mediators, all of which are real live alternatives in present day dispute resolution.

The tradition of the courts, which is reflected in the *SPPA* language, is one of confrontation. Confrontation between parties may often be the worst way to resolve differences. The Attorney General has offered a lead in Ontario in establishing new methods of dispute resolution.

It is now appropriate to include in the definition of “hearing” the use of conciliation, mediation, negotiation, settlement, paper hearings, mixed oral and paper hearings and oral hearings.

The courts have little experience with paper hearings or mixed oral and paper hearings. Only a few agencies in Ontario have conducted paper hearings or mixed paper and oral hearings, but they are easy to conduct. They can be just as fair, if not fairer, than oral hearings (there are no surprises and no trial by ambush). They are cheaper to conduct both from the public’s point of view and from that of the agency. They are far easier to manage and most important, to keep on schedule. They are much more efficient in many kinds of broad-reaching cases and they should be encouraged where appropriate.



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I, therefore, recommend that the meaning of “hearing” should be broadened whether used in a mandating statute or in the *SPPA* and that the *SPPA* be revised to make it clear to the agencies and the courts alike that the Legislature wishes to arm the agencies with all the means necessary to bring about easier, faster, more long-lasting and more economic solutions to carry out the agencies’ mandates. Agencies should have available an assortment of techniques and methods of regulating and resolving matters before them, even if the methods and techniques are foreign to the traditions and history of the courts.

The precise provisions which I would recommend for enactment are as follows:

## **HEARINGS**

- 54 — (1) Where an agency conducts a hearing, evidence, submissions, and arguments may be given in either oral or written form, or in mixed oral and written form.**
- (2) Where an agency conducts a pre-hearing conference, a mediation and conciliation or settlement conference, evidence, submissions, and arguments may be given in either oral or written form or in mixed oral and written form.**
- (3) Despite Section 10, an agency may, by order, restrict or limit the right of a party to call witnesses and to cross-examine witnesses.**
- (4) Before an agency makes an order under subsection (3), it shall give the parties an opportunity to make submissions respecting such an order.**

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## 9.6 POWER TO HOLD CONFERENCES AND ENQUIRIES

Many Ontario agencies must become more innovative in the way in which they carry out their mandates, in order to increase the volume of cases handled, to improve the opportunity for the public to participate, and to decrease the time elapsed between the start and finish of a matter.

Within the last several years, in the U.S.A. and other jurisdictions, procedures have been found to increase the effectiveness of administrative agency performance. The result has been an ability to handle an ever increasing caseload with less cost per hearing, with improved quality of performance and a much higher degree of public acceptance and support.

These procedures including the Prehearing Conference, the Settlement Conference, Conciliation and Mediation Services, Generic Hearings, Rule Making, Consolidated Hearings and Joint Hearings are described in more detail in *Macaulay: Practice and Procedure Before Administrative Tribunals*.

### 9.6.1 THE PREHEARING CONFERENCE

Prehearing conferences are used to explore matters such as the issues which will be the basis of an up-coming hearing, to settle the rules and timing at a hearing, to determine party status and interventions. From such a Prehearing Conference, which may be formal or informal, may emerge an order or decision by, or on behalf of, the agency.

Some agencies already possess the authority to hold Prehearing Conferences, but the authority should be available to all agencies. Agencies should resort to Prehearing Conferences in appropriate circumstances to take care of many procedural matters which can be very time consuming and expensive, if left until the actual hearing begins.

Prehearing Conferences avoid delays that may arise later, by exploring concerns about discovery, prehearing filings, motions about jurisdiction, applications under the *Freedom*

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of *Information and Protection of Privacy Act (FIPPA)*, and scoping the issues without the need for a further agency order, etc.

The Prehearing Conference can be presided over by a staff person, a person hired specifically for that Prehearing Conference, a single member of the agency (who may or may not sit in the main hearing), or a panel of members of the agency who may not sit later in the main hearing. The flexibility is tremendous. I recommend that the rules for calling a Prehearing Conference and the conduct of the conference itself, be developed by each agency. The following is an amendment to the *SPPA* which I recommend to give agencies the power to hold Prehearing Conferences.

## **POWER TO HOLD PREHEARING CONFERENCES**

**55. (1) An agency may direct the parties or their representatives to attend one or more prehearing conferences to consider:**

- (a) the possibility of settlement of any or all the issues in the proceedings or proposed proceeding;**
- (b) the formulation and simplification of the issues;**
- (c) obtaining of admissions to facilitate the hearing;**
- (d) disclosure of documents, reports and other evidence prior to the hearing;**
- (e) setting the date for the exchange of documents, particulars and other preliminary materials including fixing the commencement of the hearing;**
- (f) considering what issues and matters will be permitted to be developed during any hearing which may follow;**
- (g) any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.**

**(2) The chairperson may designate a member or person to preside at a prehearing conference to act for the agency with all the powers of the agency for the purposes of the prehearing conference.**

**(3) At the conclusion of the prehearing conference, the presiding person may**

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prepare a report setting out the results of the conference which may form a basis for an order of the agency.

(4) An order may be made by the agency under subsection (3) and shall govern the conduct of proceedings unless the agency otherwise orders.

(5) A member of the agency designated to preside at a prehearing conference may participate or preside at any hearing that follows.

(6) At a prehearing conference, the parties to proceedings shall give notice of any preliminary objection, including objections based on the alleged absence of jurisdiction of the agency, or objections based on the alleged bias of its members.

(7) A member or person presiding at a prehearing conference may grant party status to interested persons for the purposes of the prehearing conference and any hearing which may follow, subject to any other disposition which may be made by the panel which presides at any hearing that follows.

## 96.2 THE SETTLEMENT CONFERENCE

Settlement Conference is a procedure which an agency may use in one or two forms to encourage parties and intervenors to come together to see if there is some common ground upon which the parties can agree. In that event, the agreement is reduced to writing for presentation to the agency for adoption, rejection or amendment. Where the agency wishes to amend the settlement, the parties must be brought together again.

Any agreement that emerges from such a procedure is not binding upon the agency, but may be accepted by the agency as resolving the whole or any part of a hearing or an issue, and out of which the agency may issue an order. This can save many hours of hearing and preparation. The result can often be far more acceptable across the spectrum of the parties, than to have a decision on the same facts imposed by the agency. If the agency does not think that the settlement is in the public interest, it can either reject the settlement or propose amendments to it. Parties are still entitled to require a public hearing if it is in their interests.

Experience in the U.S.A. has shown that such Settlement Conferences have worked well in many circumstances. The power of an agency to award costs and recover agency expenses, in such circumstances, has proven, in the U.S.A., to be of great assistance in speeding up the hearing process.



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Legislation is required to enable such a process, not only to determine how the Settlement Conference will be organized, who can preside and what kind of an order can emerge, but also to make it clear that in these circumstances a public hearing may not need to be held, unless requested. In one sense, the risk of holding or not holding a public hearing will rest with the parties and the agency, where the risk ought to rest in the first place. What is important is that the public be offered a meaningful opportunity to participate. Sometimes that can be better accomplished with a paper hearing. The public interest is fully protected when the agency can hold hearings, public or otherwise, as it decides, but must hold a public hearing if requested to do so.

In order to give all administrative agencies the power to hold Settlement Conferences, the following amendment to the *SPPA* is recommended.

## **POWER TO HOLD SETTLEMENT CONFERENCES**

- 56. (1) An agency may, on its own initiative, or at the request of a party, convene a meeting of the parties or their representatives for the purpose of settling any or all of the issues in the proceedings.**
- (2) The chairperson may designate a member or person to Preside at a settlement conference to act for the agency with all the powers of the agency for the purposes of the settlement conference.**
- (3) At the conclusion of the conference, the presiding member or person shall prepare a report setting out the results of the conference, and any proposed settlement shall be placed before the agency for confirmation, interim confirmation or rejection by the agency.**
- (4) Where an agency rejects a proposed settlement the presiding member or person may reconvene the parties to reconsider the settlement.**
- (5) Where an agency rejects a settlement, the report and the terms of the proposed settlement shall not be disclosed, and shall not form part of the record of proceedings.**

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- (6) Where an agency confirms a settlement, the settlement shall bind the parties and the agency, and may form the basis for a decision or order of the agency.
  - (7) An agency may give interim confirmation to a proposed settlement where the agency has determined that in the public interest, public hearings should be held with respect to the proposed settlement.
  - (8) At the conclusion of the public hearing, the agency may confirm or reject the settlement or make such other decision respecting the proceedings as seems just.
  - (9) The member or person presiding at the settlement conference shall not participate in any hearing of the proceedings by the agency.

### 9.6.3 MEDIATION AND CONCILIATION SERVICES

In addition to holding Prehearing and Settlement Conferences, more agencies should make greater use of conciliation and mediation procedures of the sort that have worked well in labour relations in Canada. These procedures are used by U.S.A. agencies with conspicuous success, under a great variety of conditions. U.S.A. Legislators saw the need and provided the authority. This is what I am recommending be done in Ontario.

**Mediation and conciliation are of value for two reasons.**

**First**, better use of agency resources, and better results for the parties in terms of acceptance, cost and delay. An agreed-upon settlement is always better than an imposed settlement. This is particularly important where there is an ongoing relationship between the parties. The answer to any difference of opinion, or a dispute, is no longer simply to hold a hearing and issue a decision. In fact, this may be exactly what is not needed.

**Second**, the setting in which to settle many disputes between citizens and between citizens and the state is not in confrontation before a court, or a court-like body, but, initially at least, in conciliation and mediation, under the supervision of an administrative agency. Agencies have the expertise to bring about solutions built upon cornerstones other than confrontation and judicialization.

What is needed today is a settlement or resolution process which does not rely on confrontation. Alternate Dispute Resolution (ADR) may still end up in confrontation, but

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that is an end which an agency should seek to avoid. At the very least, the dispute can be eased and processed through conciliation, enabling the parties to find their own solution; or through mediation, providing the disputants with a solution which they may or may not adopt.

In Ontario, we have agencies with caseloads of 5,000 a year and 250,000 files, and this is on the increase. These are what are known as mass adjudication or high volume agencies, where the need for better solutions than the standard, traditional mechanisms of fighting it out is acute. There are modern processes such as Settlement Conferences, conciliation, mediation and arbitration with which few agencies, other than labour agencies, have had any experience due to lack of resources, authority and a role model. There are at least eight major agencies which I believe have a need for investigatory, conciliatory and mediation services, many of the resources for which could be shared economically to great advantage to the system. The files and case load of these agencies in total is immense.

To make use of conciliation and mediation mechanisms, new legislation will be required, similar to that which I have described and drafted in the proposed amendments to the *SPPA*. What we may be able to do with these agencies is to offer them common conciliation and mediation services, which could lead to a report to the particular agency. The agency then could review the recommendation and approve it, or send it back for further study, or forward it on for a hearing.

There are many better ways to do things with administrative agencies. I am confident that we could refine them through a Council and work out practical solutions which would save time and money. In the meantime, I recommend that all agencies be given the power to make use of the conciliation and mediation process to resolve what otherwise is a heavy adjudicative load. One should not assume that this is recommended merely to respond to mass adjudication agencies. This is not the case. Adjudication and confrontation are not the best ways to resolve many kinds of matters coming before agencies in this day and age.

If agencies are to be able to use conciliation and mediation, they will need to have the authority to enter into the process and the legal mandate to make decisions which involve the process. Later will come the needed resources. In the meantime, there is no statutory authority.

In some cases, the matters at issue between two or more parties involve more than just the

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parties themselves. Sometimes the public interest must also be taken into account. In these circumstances, a proposed agreement must be put to the agency for confirmation, for the agency must have the latitude to decide whether the public interest has been adequately protected. The agency must be able to determine whether further public hearings need to be held. In these circumstances, the agency may give interim confirmation to a proposed settlement pending final confirmation after a public hearing.

There are opportunities to share the cost of these services and in doing so to become even more cost effective.

## **MEDIATION AND CONCILIATION**

- 57. (1) An agency may on its own initiative, or at the request of the parties to proceedings, convene a meeting of the parties, or their representatives, to mediate or conciliate the issues in the proceedings.**
- (2) The chairperson may designate a member or members of the agency, or a person or persons, to preside at a mediation or conciliation conference.**
- (3) At the conclusion of the conference the presiding member or person may prepare a report setting out the results of the conference for confirmation, interim confirmation, or rejection by the agency.**
- (4) Where an agency rejects a report the presiding members or person shall reconvene the parties.**
- (5) Where an agency or a party rejects a report, the report shall not be disclosed, and shall not form part of the record of proceedings.**
- (6) Where an agency confirms a report, the agency may make an interim or final order.**
- (7) An agency may give interim confirmation to a proposed report where the agency has determined that in the public interest, public hearings should be held with respect to the proposed report.**
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**(8) At the conclusion of the public hearing, the agency may confirm or reject the report or make such other decision respecting the proceedings as seems just to the agency.**

**(9) The members presiding at a mediation or conciliation conference shall not participate in any hearings of the proceedings by the agency.**

## 9.6.4 GENERIC HEARINGS

A generic hearing is one in which a policy issue or a matter of general importance to an agency is argued by interested parties in order to enable the agency to establish a policy.

A proven, useful authority for an administrative agency to possess is the authority to hold generic hearings, whether the hearing is oral or on paper. Very few agencies have held generic hearings in Ontario, largely because many agencies have doubts about their authority to hold them, and a confusion about their right to declare general agency policy. Generic hearings may lead to an agency publishing a report for its own use, for use by the government, or to lay down a policy that will govern its operations in the future.

However, there is some misapprehension about agency decisions constituting policy, and there is a failure to distinguish between government policy and agency policy. In *Capital Cities v CRTC* [1978] 2 SCR 141, the Supreme Court of Canada held that with every decision, an agency makes policy, and these decisions when read as a whole, make very broad statements of agency policy. As the Court indicated, an agency can do this a bit at a time or all at once.

Consequently, unless an agency is precluded by its legislation, it ought to be able to hold a generic hearing, at which public participation is invited. From it may emerge, if thought appropriate by the agency, one or a series of policy statements. The Supreme Court of Canada went on to state that the policy statements must not fetter the future decisions of the agency. I would observe that the mandating legislation can empower an agency to set its own policy, which it will apply in the future, until such time as the agency changes that policy, which it should do, as the facts and circumstances warrant.

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The reason why some agencies, particularly regulatory agencies, should be given the clear authority to declare agency policy is that plans of the constituents often depend upon how an agency intends to treat a specific matter. Large investments, for example, may not be made unless investors and the financial community know generally how that investment will be treated by the regulatory agency. Much the same reasoning applies in the case of taxation and other government treatment. Industry has to know ahead of time how an investment will be treated or regulated or the investment may not be made.

The future course of an agency should be based on its policy and not, as in the case of court decisions, have to wait upon an appropriate set of facts to determine how a matter will be treated. Often, by the time the right set of facts arises, the time may have passed for a policy and much time, opportunity and money has been wasted.

By recommending generic hearings, I am not recommending that agencies should fetter themselves by establishing policies. As a matter of law, an agency is not bound by its own decisions and must not do anything to fetter its discretion for future decisions unless the legislative mandate permits otherwise. When one comes to think about this legalistic concept, one realizes that for agencies, there is little in its favour and a great deal against it. Agencies must develop policy as a basis for consistent and dependable practices and decisions, otherwise the public has no possible way of knowing how the agency may treat a matter in the future.

I recommend, therefore, that all agencies be empowered to hold generic hearings from which they can develop and announce statements of agency policy. These statements will govern the conduct and practice of the agency in the future, until changed by the agency as a result of another generic hearing or during the hearing of a specific case.

## **GENERIC HEARINGS**

- 58. (1) An agency may, on its own initiative, or at the request of an interested person, and shall at the direction of the Lieutenant Governor, inquire into and hear and determine any matter within its jurisdiction.**

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**(2) The agency shall give public notice of the proceedings under this section, which notice shall include,**

**(a) a statement of the time and nature of the hearing; and,**

**(b) a statement of the statutory authority under which the hearing is to take place, and;**

**(c) a statement of the issues which the agency wishes to consider.**

**(3) An agency may conduct a hearing orally or in writing, or mixed oral and written hearings, as it decides is appropriate under the circumstances.**

**(4) An agency may retain such counsel and experts as may be required for a full and fair inquiry into the matter to be determined.**

**(5) An agency will give interested persons an opportunity to participate in hearings under this section.**

**(6) At the conclusion of an inquiry under this section, an agency may issue a policy statement, guideline, order, opinion or decision with respect to the matters considered in the hearing.**

## **9.6.5 RULE MAKING**

Closely related to, but different from generic hearings, is the process known as “rule making.” In many ways, a “rule” and a “policy” can be seen to be much the same thing. In fact, they differ. A “rule” is more closely related to “regulatory” agencies (in that “regulatory” agencies issue “rules”), whereas a “policy” relates to any agency.

In essence, “Rule Making” is a process whereby an agency announces to the constituents regulated by the agency, that it intends to declare certain rules or policies, which will apply to its constituents in the future. The agency then invites comments upon the proposed rule or policy.

The comments may or may not lead to a hearing upon either the responses or the policy. This process has been very useful in the U.S.A. for most of the major regulatory agencies such as, the Federal Energy Regulatory Commission (FERC), and the Environmental Protection Agency (EPA). The EPA and FERC proceed by “rule making” rather than

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through a hearing. But with “rule making,” there will be no hearing first and, in fact, there may be no hearing at all, or only a paper hearing, dependent upon how the matter proceeds.

The rule dealing with “rule making” contained in the *U.S.A. Federal Administrative Procedures Act* (replicated in most states) is attached in Appendix 9-1. These Acts as well, usually enable the constituents to petition the agencies to “rule make” (see Recommendation 86.6 “Petition for Rule Making” set out in the Recommendation and Reports (1986) of the Administrative Conference of the United States).

I recommend that all agencies be enabled to make policy statements in a fashion that is analogous to the Rule Making procedure in the U.S.A., and that this not be limited to regulatory agencies, so that if the process can be adapted to the mandate of other than regulatory agencies in Ontario, that such be encouraged. One of the purposes of many of these processes is to reduce hearing time, to save public and private expense, and to place the public much closer to the decision-making process: namely, at the forefront and not in the vortex.

The following recommendation is proposed dealing with Rule Making.

## **RULE MAKING**

- 59. (1) An agency may, on its own initiative, or at the request of an interested person, conduct rule making proceedings.**
- (2) The agency shall give public notice of proceedings under this section, which notice shall include,**
- (a) a statement of the time and nature of the public rule making proceedings;**
  - (b) a statement of the statutory authority under which the rule is proposed; and**
  - (c) the terms or substance of the proposed rule.**
- (3) The agency may conduct oral hearings or written hearings or mixed oral and written hearings under this section.**
- (4) An agency may retain such counsel and experts as may be required for a full and fair inquiry in proceedings.**



**(5) An agency shall give interested persons an opportunity to participate in proceedings under this section.**

**(6) An interested person may apply to the agency for the issuance, amendment or repeal of a rule on such terms and conditions as the agency may determine.**

## **9.6.6 CONSOLIDATED HEARINGS**

Agencies need greater flexibility to hear and resolve a wide range of disputes and issues. Given the nature of many agency proceedings, many parties can raise substantially the same issues. Agencies should have the power to join several matters in one hearing to ensure that duplication be avoided. I propose an amendment to the *SPPA* which will give greater flexibility to agencies.

## **CONSOLIDATED HEARINGS**

**60. (1) Where two or more proceedings are pending before an agency and it appears that**

- (a) they have an issue or question of law, fact or policy in common; or,**
- (b) it is in the interest of a just expeditious resolution of proceedings;**

**an agency may, of its own motion, or upon the application of a party or other interested person, order that,**

- (a) proceedings be consolidated,**
- (b) proceedings be heard at the same time,**
- (c) proceedings be heard one immediately after the other,**
- (d) proceedings be stayed until after the determination of any other of them,**
- (e) evidence adduced in the one shall be applied to the other, or**
- (f) an order or decision made with respect to one proceedings shall be applied to the other.**

**(2) An agency may make additional orders respecting the procedure to be followed with respect to proceedings under this section.**

**(3) For the purposes of this section, an agency may designate a party as the representative of other parties.**

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## 9.6.7 JOINT HEARINGS

In some cases, a party must proceed before two or more agencies with respect to a single issue or matter. *Consolidated Hearings Act*, 1981, S.O. 1981, c. 2, makes provision for single hearings before panels composed of members from two agencies. A weakness of the Act is that a “consolidated hearing” must be requested before it can be held. I believe that there are circumstances where it is apparent that a hearing ought to be heard by a consolidated panel where the matter at issue involves several agencies. There have been examples in the past where the member of one agency has been named to another agency for the limited purposes of a specific hearing.

I would recommend an amendment to the *SPPA* which would allow the Lieutenant Governor in Council (LGIC) to create a Joint Board (a combination of two or more agencies), either at the initiative of a party or of a Ministry or an agency. The panel created as a “Joint Board” would have the authority to act for any agency involved in the matter, and thereby to bind each involved agency.

I, therefore, recommend that there be created a procedure to convene Joint Boards. I propose an amendment to the *SPPA* which would permit the LGIC to convene a joint panel, the members of which would be chosen among the agencies responsible for a matter. The panel would hear and decide issues on behalf of the agencies. The Council could play an important role in developing and coordinating multi-agency hearings in this manner. The time and money that could be saved in this type of streamlining is substantial.

## JOINT HEARINGS

61. (1) This section applies to matters where more than one hearing or proceeding is required before more than one agency.
- (2) The Lieutenant Governor in Council may, on application by an agency, an interested person, or on his or her own motion, by Order in Council, convene a joint panel composed of members chosen from among the members of the agencies having jurisdiction over the matter and shall appoint a president of the panel from among the members of the panel.

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61. (3) The Order in Council shall set out the nature of the matter to be considered, the procedure to be followed by the joint panel and any other provision to assist in the expeditious resolution of the matter.

(4) A decision of a joint panel shall bind the agencies involved.

## 9.7 CASE MANAGEMENT

Reducing the delay and costs of administrative agencies must be a priority. Research shows that lawyer-driven delay is a major cause of expense in agency litigation. In my discussions with agency chairpersons, most were very sensitive to the maxim, “Justice delayed is justice denied.” However, it became clear that many agencies are unaware of important techniques to expedite matters brought before them, in particular *Case Management*. Moreover, many agencies do not have the power to apply this technique effectively.

Case management is used in Ontario only by a few agencies (the Ontario Energy Board (OEB) is one), but has been used extensively with U.S. agencies. Using this technique, the agency takes an active and rigorous role in the preparation of the case. It controls the timetable and requires the parties to cooperate in seeing the matter to a conclusion in a timely and economic manner.

At the outset, a case manager is appointed by the agency. The case manager may be a member of the agency or of its staff, or may be someone hired by the agency for the occasion. With the parties, the case manager establishes time frames for delivery and exchange of exhibits and other material, canvasses issues, narrows issue, attempts to obtain admissions and generally ensures that the parties proceed at pace determined by the agency. In doing so, the agency must balance the legitimate interests of the parties with the proper performance of the agency and the public interest.

How would this operate in practice?

Let us take the example of a licence revocation matter. Revocation proceedings are usually commenced by a notice of proposal to revoke by a licensing authority. The licensee is

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usually obliged to file a notice of appeal in response to the licensing authority with the reviewing agency. At present, the agency first sees the parties at the date set for the hearing. Under case management, a member of an agency would contact the parties to arrange a conference to discuss the nature of the issues, the possibility of a settlement, and, where no settlement appears possible, arrange a timetable for the exchange of documents and particulars, consider the number of witnesses and canvass the possibility of obtaining admissions on non-contentious facts. The parties would be required to adhere to the timetable.

Further conferences would be convened as necessary to keep the proceedings moving expeditiously. Both parties would have more knowledge about the cases to be made and to be met. Preparation time and witness time could be reduced accordingly, and generally, a better hearing could be held as a result of early involvement by an agency member.

In more complex planning, rate setting or other regulatory matters involving many parties, many interests, extensive exhibits and other materials, many witnesses, many issues, the case management technique can be adapted to suit the circumstances of the particular proceedings and still increase agency efficiency.

At the end of the evidence, but before argument, the Case Manager should file with the panel on the record, a Case Manager Report which will outline the management of the case and any problems in relation to timing and other relevant matters. The panels will take that Report into consideration in terms of awarding costs.

The experience in the U.S.A. has clearly shown that case management reduces the expenses and delay of agency proceedings.

## **CASE MANAGEMENT**

**62. (1) At any time after the commencement of proceedings, the chairperson may, on his or her own initiative, or at the request of a party, designate a member or other person as case manager of the proceedings.**

**(2) The case manager of the proceedings shall communicate with the parties and their representatives to consider:**



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- (a) the settlement of any or all of the issues;**
  - (b) disclosure of evidence;**
  - (c) production of expert reports;**
  - (d) admissions of fact not in dispute and proof of such facts by affidavit;**
  - (e) the times within which disclosure, production and admissions are to made; and**
  - (f) such other matters to assist in the just, more expeditious and least expensive disposition of the proceedings.**

**(3) The case manager shall give directions to the parties with respect to the matters set out in subsection 2.**

**(4) The directions of the case manager are binding on the parties and in its decision an agency may take in account the adherence of a party to the directions, and, in addition, may assess costs and recover hearing expenses from a party to compensate for its non-compliance with the directions.**

**(5) The case manager shall file a Report concerning the management of the case at the conclusion of the evidence, or at such other time as directed by the panel.**

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## 9.8 AUTHORITY OF AN AGENCY TO STATE A CASE

From time to time, an agency may be in doubt about whether it has the jurisdiction to deal with a matter or to proceed in a specific fashion. In that case, the agency may wish to ask the court for guidance. However, the agency has not the authority to ask the court for guidance unless permitted by the mandating legislation.

It can be very wasteful both in terms of money and time for an agency to continue hearing a matter when there is doubt as to its jurisdiction. Accordingly, I recommend as an amendment to the *SPPA*, that all agencies should have the authority to state a case on a matter of law to the Divisional Court of Ontario. Several other matters are dealt with, as well, in the proposed amendment, in that it:

- (i) permits the agency to state a case under various circumstances;
- (ii) permits the agency to state a case to the court where it alleges that the Ombudsman does not have jurisdiction in relation to an investigation he may be conducting concerning the agency (as discussed in Chapter Six);
- (iii) indicates to the Court the matters which the Legislature requests the Court to look at in answering the question asked of the Court;
- (iv) directs the Court to hear the stated case and report to the agency;
- (v) obliges the Court to give the agency an opportunity to make representations through its counsel, if and to the extent that the agency wishes to be heard by the Court;
- (vi) allows the agency to proceed with other aspects of the matter before it, even though it has stated a case;
- (vii) protects the agency from having costs awarded against it;

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- (viii) allows the agency to appeal from the Divisional Court to the Court of Appeal. It would appear now that the Court of Appeal has no jurisdiction in such circumstances unless it is statutorily provided (see note in *Re Ontario Highway Transport Board and Ontario Trucking Association* 66 O.R. (2d) 552).

While I believe that the amendment should apply to most agencies, I am aware that there may be exceptions, such as the Workers' Compensation Appeals Tribunal legislation, where there is, for example, a provision that the Workers' Compensation Board has certain authority in respect to the Appeal Tribunal's decisions on the law. In any event, by an OIC, the Government is able to exclude certain agencies from this provision, upon consultation with the ministries and the agency, where appropriate.

The mandating acts of several agencies require the agency to state a case, if asked by a party to do so. I believe that an agency ought not be forced to state a case because it is in the best position to know whether or not the answer from the Court will be helpful to it at that stage. I have, therefore, provided a "Despite any other act to the contrary. . ." clause so that the agency need not state a case, even if some other Act requires it to do so.

Here, then, is the proposed amendment dealing with stating a case to the Divisional Court:

## **AGENCY TO STATE A CASE**

- 63. (1) Despite any other Act to the contrary, an agency may, at the request of the Lieutenant Governor in Council, or of its own motion, or upon the application of any party to proceedings before the agency, upon such security being given and upon such terms as directed by the agency, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the agency, is a question of law.**
- (2) An agency may apply to the Divisional Court for a declaration or order respecting the jurisdiction of the Ombudsman to investigate any case or class of cases under the Ombudsman Act respecting the agency.**
- (3) In matters arising under this section the Divisional Court shall consider,**
- i) the purpose served by the agency;**
  - ii) the social, economic and other policies administered by the agency;**

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- iii) the legislative history of the statutory or other instruments establishing the agency;
  - iv) the effect on the policies and programs administered by the agency of alternate answers to the question of law put to the Court.
- (4) The Divisional Court shall hear and determine the stated case and remit it to the agency with the opinion of the Divisional Court for the guidance of the agency.
- (5) The agency is entitled has a right to be heard by counsel on the stated case.
- (6) Where an agency has stated a case, the agency may proceed on those aspects of the matter not directly affected by the stated case.
- (7) The agency and its members are not liable for costs in proceedings under this section.
- (8) The opinion of the Divisional Court on a stated case may be appealed to the Court of Appeal, with leave of that Court.



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## 9.9 SWEARING WITNESSES

Some agencies have the power to swear or affirm witnesses while some do not. Even those that have the power to do so, do not always use it. Some agencies believe that swearing or affirming testimony makes no difference and others believe that swearing or affirming destroys the informality of the hearing. I believe the *SPPA* should be amended to empower all agencies to swear or affirm witnesses and to establish that all agencies which receive evidence in a hearing, even a paper hearing, should receive it under oath. Materials filed in a paper hearing should be accompanied by an appropriate affidavit and evidence should only be taken after an oath has been administered. In that regard, there should be conformity of procedure before agencies in Ontario.

It is apparent that every hearing receives evidence, oral or written. It is well known that when a witness gives evidence under oath or by affirmation, there is a much stronger onus to respect the truth. I believe it is better if all agencies are required to impose an oath or affirmation except in unusual circumstances for which I would propose that a discretion be permitted. This is all the more desirable if we are to have a common basic hearing procedure across all hearing agencies, allowing for necessary differences.

Section 22 of the *SPPA* now provides:

“A member of a tribunal has power to administer oaths and affirmations for the purposes of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation.”

The word “may” should be changed to “shall”. I would also provide the following amendment.

### FORM OF OATHS

- 64. The Lieutenant Governor in Council may make regulations respecting the form of oath and solemn affirmation to be administered by agencies.**

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## 9.10 PANELS OF WITNESSES

From time to time, agencies will be required to consider subjects of some complexity where no single expert can deal with the whole subject, or subjects over which more than one person bears responsibility.

In these circumstances, agencies may wish to convene a panel of experts or persons responsible to give evidence. Each person must be sworn separately. Questions may be put to individual panel members or to the panel as a whole. The purpose is to get the best response from the best qualified person.

Members of the panel may have subordinates in attendance to supply information if required. The approach is particularly valuable where the agency is receiving opinion evidence. Panels are uncommon in the courts, but ought to be used in some kinds of agency hearings.

I recommend the following amendment.

### PANELS OF WITNESSES

**65. (1) An agency may by order convene and receive evidence from panels composed of two or more persons.**

**(2) An agency shall not make an order under subsection (1) without giving the parties an opportunity to make submissions.**

**(3) Where a panel is convened under subsection(1), each member of the panel shall be sworn and qualified individually.**

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## 9.11 ENFORCEMENT

At the present time, the enforcement of the orders of administrative agencies lies either within the *SPPA*, whose provisions are weak and cumbersome and out of date, or within the mandating legislation of the agency. As in other areas, this legislation varies enormously from agency to agency and only in a few cases does it give an agency the power appropriate to enforce their own decisions. Nearly all agencies issue what are called either “orders” or “decisions”.

A **DECISION** is a document which an agency issues after a hearing has been completed. It sets out the nature and background of the issues which came before the agency for decision, the nature of the evidence presented to the agency, the findings or conclusions of the agency, and the reasons ascribed by the agency for each of the findings. The decision, at the end, may include a formal pronouncement of its directions, which one could call “the order” portion of a decision.

**AN ORDER**, on the other hand, is the formal and often separate document which is issued by an agency in addition to the decision which sets out the operative portion of the decision. The order clearly sets out in very precise language exactly what is to be done by whom, under what conditions and when. The order is much shorter than a decision and translates the decision into action. Note as well, that orders are usually in writing. However, dependent upon the circumstances, an order may be verbal and need not be associated with a decision, such as an order given by an agency during a hearing as to a matter of procedure.

The very purpose of a hearing is that a decision and an order should emerge from it. Most decisions do not need to be enforced because the parties carry them out in accordance with the directions of the agency. In a sense then, most decisions are self-enforcing. However, there are decisions or orders which may require enforcement by some body with authority, because the parties may be slow, negligent, diffident or opposed to the decision or order.

Having reviewed many decisions and orders in the preparation of this Report, I conclude that many decisions would be very difficult to enforce, because they are unexplicit and

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difficult to supervise as written. This is avoidable. Most courts would have difficulty enforcing these orders, due to their unfamiliarity with agency procedure and practice.

I believe that the agency itself, and not the courts, is the place to originate the enforcement of agency decisions. The power to enforce an agency decision or order is clearly auxiliary to the agency mandate, which is itself within the constitutional capacity of the Province. The enforcement of orders and decisions by the sheriffs of this Province is an existing mechanism under the *SPPA*, which can be easily used by agencies without the intervention of the courts. Agencies can use this enforcement arm. The only issue is whether that arm should be put into operation by way of a judge's order or by way of an agency's order.

The mandating legislation of many agencies provide for a method of enforcing decisions of the agency. With inexplicable variations, the provisions parallel the general provision found in the *SPPA*, which reads as follows:

“19. (1) A certified copy of a final decision and order, if any, of a tribunal in any proceeding may be filed in the Office of the Registrar of the Supreme Court by the tribunal or any party and, if it is for the payment of money, it may be enforced at the instance of the tribunal or of such party in the name of the tribunal in the same manner as a judgment of that court, and in all other cases by an application by a tribunal or by such party to the court for such order as the court may consider just.”

Thus, a money order can be put into the hands of a sheriff without the intervention of a judge, but other decisions or orders must go through a judge before they are given to a sheriff for enforcement. This is cumbersome, slow and expensive. In addition, it would appear that a judge has a discretion whether to enforce an agency decision. I believe that such was never intended. This kind of judicialization is not necessary but was clearly part of the judicial thinking that was involved in creating the *SPPA*.

It is possible that such an order or decision will not carry with it interest thereon. I believe that the order of an agency should be treated in like form to an order of a court.



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There are a number of Acts which provide some guide as to the form for an enforcement procedure which the agencies would share in common.

Section 17 of the *Ontario Highway Transport Board Act*, RSO 1980, c. 338:

“17.- A certified copy of the order of the Board under this or any other Act may be filed in the office of the Registrar of the Supreme Court and thereupon it becomes a judgment or order of the Supreme Court enforceable in the same manner as a judgment or order of that court to like effect.”

Note that these orders are not limited to money orders as is Section 19 of the *SPPA*.

Therefore, I recommend that section 19(1) of *SPPA* be repealed and replaced by a section similar to section 17 of the *Ontario Highway Transport Board Act*.

## **ENFORCEMENT**

- 66. (1) A certified copy of an order made by an agency may be filed in the office of the Registrar of the Supreme Court, whereupon the order shall be dealt with in the same way as a judgment of that court and is enforceable as such.**
- (2) Any order so filed may be rescinded or varied by an agency at any time in the manner provided in section (xx). [Power to Rescind]**
- (3) An order of any agency requiring a person to pay money, costs, hearing expenses or otherwise, to the agency, to any party to a proceeding before the agency or to any other person as costs or otherwise, may be enforced by a written direction from the agency to the sheriff of any county or district endorsed upon or annexed to a certified copy of the order.**
- (4) The sheriff receiving such a direction shall levy the amount named therein with his costs and expenses in like manner and with the same power as if the endorsed order were an execution issued out of the Supreme Court against the goods of the person named in the order, and the order so endorsed constitutes a lien and charge upon the property, real or personal, or the interest therein of the person named in the order, that is situate in such county or district to the same extent and in the same manner as the property would be bound by the filing with the sheriff of an execution issued after judgment of the Supreme Court.**
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**(5) Where the person named in any such order holds lands or any interest therein that is registered in a land registry office, the agency may register a certified copy of the order with the proper land registrar, and, when so registered, it constitutes a lien and charge upon the land to the same extent and in the same manner as an execution issued after judgment in the Supreme Court and registered with the proper land registrar.**

**(6) The amount ordered to be paid by any order registered under subsection (5) may be realized in the same manner and by the same proceedings, with necessary modifications, as the amount of any registered execution of the Supreme Court.**

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## 9.12 CONTEMPT

The power of an agency to maintain order during its hearings is covered in a most complicated fashion in the *SPPA*. The whole question has become more complex as a result of the passage of the Charter of Rights (see *R v Kopyto* (1988) 62 O.R. (2d) 449, freedom of expression and criminal contempt). Section 9(2) of the *SPPA* states:

“A tribunal may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take action as is necessary to enforce the order or decision and may use such force as is reasonably required for that purpose.”

Subsection (2) goes only part way in the matter of controlling the conduct of a hearing. The real power of the agency lies in the inchoate ability to find contempt and to punish it, even if seldom exercised. The power can be given constitutionally to agencies. I believe that they can be trusted with this power. However, if it was thought that the agency in its decision had overstepped the mark in some way, there are all kinds of relief that can be sought to correct what has been ordered, including asking the agency to reconsider the order or applying to the court for review.

Section 13 of the *SPPA* reads as follows:

- “13. Where any person without lawful excuse,
- (a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or,
  - (b) being in attendance as witness at a hearing, refuses to take an oath or make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his power or control legally required by the tribunal to be produced by him or to answer any question to which the tribunal may legally require an answer; or,
  - (c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

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the tribunal may, of its own motion or application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal, or by such party, inquire into the matter and, after hearing any witness who may be produced against or on behalf of that person and after hearing any statement that may be offered in defense, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court.”

As things stand, by the time an agency can get to the court to plead its case, the contempt is likely over, the authority of the agency is diminished and its on-going ability to monitor or regulate the area of its mandate is weakened (see *Ajax and Pickering General Hospital* (1981) 32 OR (2d) 492 H.C.J. where the court held that it did not have jurisdiction to punish a non-current contempt).

I find it difficult to understand how an agency can be “master of its own proceedings” (to use the words of the late Chief Justice Laskin) when it is told that if it can’t control its own proceedings, it ought to state a case to the court, then wait to be heard, only to be told by the Court that it will not deal with the contempt because it is not continuing.

Agencies (except those excluded by a schedule to the proposed amendments to the *SPPA*) should have the power to find contempt and punish it, when committed in their presence. I believe that both the power to find an offence and to impose punishment should repose with the agencies.

The provisions contained in the *Courts of Justice Act, 1984*, Section 71 are a useful example:

“71. (1) Except as otherwise provided by an Act, every person who commits contempt in the face of the Provincial Offenses Court is on conviction liable to a fine of not more than \$1000 or to imprisonment for a term of not more than thirty days, or both.

(2) Before proceedings are taken for contempt under subsection (1), the court shall inform the offender of the conduct complained of and the nature of the contempt and inform him or her of the right to show cause why he or she should not be punished.



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(3) A punishment for contempt in the face of the court should not be imposed without giving the offender an opportunity to show cause why he or she should not be punished.

(4) Except where, in the opinion of the court, it is necessary to deal with the contempt immediately for the preservation of order and control in the court-room, the court shall adjourn the contempt proceeding to another day.

(5) Where a contempt proceeding is adjourned to another day under subsection (4), the contempt proceeding shall be heard and determined by the court presided over by a provincial judge.

(6) Where the court proceeds to deal with a contempt immediately and without adjournment under subsection (4), the court may order the offender arrested and detained in the courtroom for the purpose of the hearing and determination.

(7) Where the defender is appearing before the court as an agent who is not a barrister and solicitor entitled to practice in Ontario, the court may order that he or she may be barred from acting as agent in the proceeding in addition to any other punishment to which he or she is liable.

(8) An order of punishment for contempt under this section is appealable in the same manner as if it were a conviction in proceedings commenced by certificate under Part 1 of the *Provincial Offenses Act*.

(9) The *Provincial Offenses Act* applies for the purpose of enforcing punishment by way of fine or imprisonment under this section."

Section 23 of the *SPPA* infers the right to find and punish contempt. It is toothless if it does not include some "on-the-spot" disciplinary power.

"23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its process."

Thus I recommend that a section much like section 71 of the *Courts of Justice Act, 1984* be introduced as an amendment to the *SPPA*.

I, therefore, recommend that the *SPPA* be amended to include the following provision:

## CONTEMPT

**67. (1) An agency may make such orders or give such directions in proceedings as it considers necessary to prevent abuse of its process.**

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(2) An agency may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at a hearing, and if any person disobeys or fails to comply with any such order or direction, the agency or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) An agency may by order impose a fine of not more than \$1,000.00 for a first offence and not more than \$10,000.00 for a subsequent offence against a person or persons who have committed contempt in the face of the agency.

(4) In addition to imposing a fine an agency may,

- (a) impose restrictions on the continued participation of a person in proceedings, and may exclude a person from further participation in proceedings before the agency until the agency otherwise orders;
- (b) order a person to pay expenses incurred by the agency in connection with the contempts.

(5) An order made by an agency under this section shall be enforceable in the manner set out in section 66 [Enforcement of Orders].

(6) An agency shall make an order under subsection 3, only after,

- (a) informing the offender of the nature of the contempt and of his or her right to show cause why he or she should not be fined; and,
- (b) offering the offender an opportunity to show cause why he or she should not be fined.

(7) Except where in the opinion of the agency it is necessary to deal with the contempt immediately for the preservation of order and control in the hearing room, the agency shall adjourn the contempt proceedings to another day.

(8) An order of contempt made under this section may be appealed to the Divisional Court with leave of that Court.

(9) An agency may appear by counsel on an application for leave and on an appeal under subsection (8) and is entitled as of right to be heard on an application and an appeal under this section.

(10) An agency and its members and employees shall not be liable for court costs incurred in an appeal under this section.

(11) An appeal from an order of contempt to the Divisional Court does not operate as a stay in the matter except where the Court otherwise orders.

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## 9.13 ENFORCING UNDERTAKINGS

From time to time a person will give an undertaking either to an agency or to the Lieutenant Governor in consideration of the Lieutenant Governor or the agency permitting or dispensing with certain procedures that fall within the mandate of the agency.

Very often, these undertakings, although of major importance to the agency and its on-going responsibilities, are not monitored or enforced through the Lieutenant Governor, and cannot be monitored or enforced by the agency because it has no power to do so.

I, therefore, recommend that when an undertaking by a person is given that the agency shall have the authority to monitor the undertaking, and to enforce it as if the undertaking had been an order of the agency. In addition, the agency shall be deemed to have the authority to monitor all undertakings given to the Lieutenant Governor respecting the agency and, upon the recommendation of the Lieutenant Governor in Council enforce the same.

An amendment to the *SPPA* would implement the above recommendation:

## ENFORCING UNDERTAKINGS

- 68. (1) Where a party to proceedings before an agency gives an undertaking to the agency or to any person, the agency may monitor the performance of the undertaking and, where a party has failed to adhere to an undertaking, may, by order, order the party to comply with the undertaking.**
- (2) An order made under this section shall be enforced in the same manner as an order under section 66 [Enforcement of Orders]**
- (3) An order shall not be made under this section unless the party has been informed of the nature of the breach and has been given an opportunity to show just cause why an order should not be made.**

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## 9.14 COSTS

In Chapter Seven of this Report, there is a full discussion of the question of recovery of hearing expenses and other fees which an agency could charge parties involved or effected by its proceedings. There, I recommended that in many instances, agencies should charge hearing expenses to parties when the agencies consider this appropriate.

The term “costs” is the subject of much misunderstanding when used in relation to agencies, largely because agencies differ significantly from courts, where the term is clearly understood.

In a court, court costs may be awarded to the successful party as reimbursement for the expenses of litigation. There is no provision within court procedure to charge the expenses of the court to a party. Likewise, there is no court procedure to provide funding in advance to aid a party to appear in proceedings. But all three procedures can occur in an agency proceeding.

When an agency has the power to award costs, the meaning of the word “costs” cannot be taken to mean the same thing to an administrative agency as to a court. And when an agency does award costs, the criteria often differ from the criteria used by courts.

I would have thought that in deciding what the Legislature meant when it used the word “costs”, in the mandate of an administrative agency, that one would analyze the difference between the nature of court and agency proceedings. Most of all, one should expect that in determining the meaning of the word “costs” as used in an agency statute, the whole statute within which the word “cost” is used, should be looked at to determine the intended application of the word.

Two test cases came before the Divisional Court in 1985 in which the Court neither analyzed nor rationalized the difference in function between an administrative agency with a mandate to protect the unrepresented public interest and the function of a court. The decisions suggest that the Court did not read the statutes as a whole, or correctly. The two decisions to which I refer are well known as *Re Ontario Energy Board* (1985) 51 O.R. (2d) 333 and *Re Regional Municipality of Hamilton-Wentworth* (1985) 51 O.R. (2d) 23. Reaching



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back as far as *Blackstone* (1857) and *Marshall* (1860) in England, the Court held that the word “costs” in the two statutes should be given the traditional meaning that a court would apply in one of its own cases, despite the fact that the *Ontario Energy Board Act* (OEB) makes it clear that the word “costs” in the Act is not to be interpreted in that fashion. Costs in that Act are to include the hearing expenses of the agency itself, which could never, with the liveliest imagination, be thought to be within the traditional meaning of “costs” to a court.

The OEB decision in particular seemed to confirm the view of Professor Arthurs.

“It is relatively rare for a judge to explore, or defer to, accepted administrative interpretations, or to seek to inform himself of the general context and operation of a statute before applying it.”

The Supreme Court of Canada, in a decision which was released a few weeks after the Divisional Court decision *Bell v Consumers Association* (1986) 1 SCR 109), held that although costs do constitute “indemnity”, the agency should be free to broadly interpret the word “indemnity”. The Divisional Court in the *OEB* decision made no such finding and found the opposite.

Seemingly in response to the decisions of the Divisional Court in the two “cost” cases, the Attorney General introduced into the Legislature in the summer of 1988 what is known as Bill 174. The Bill became law in December, 1988.

The Bill provided that costs in the *OEB Act* shall not mean “court costs”, as the Divisional Court had held. Thus in Ontario, we have mixed bag as to what “costs” mean when used by the Legislature in an act. We have the Divisional Court saying that “costs” mean “court costs”. We have the Legislature saying in three Acts that “costs” do not mean “court costs”, and we have the Supreme Court of Canada saying that “costs” may mean “court costs”, but costs should be arrived at by very broad criteria, that a court would never apply to determine the level of costs in a court.

Even without that confusion, there is no consistency concerning the cost provisions in the Ontario agency legislation.

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- Some agencies have no power to award costs
  - Some agencies have what appear to be very limited cost powers
  - Some agencies have what appeared, when they were drafted, to be strong cost powers, including the power to recover the agency's expense in holding a hearing.

I recommend that we end this ambivalence and confusion. In order to effect such changes, the *SPPA* should be amended as follows:

## **COSTS**

- 69. (1) In this section, “costs” include legal fees, expert fees, witness fees, fees for the preparation of evidence, travel and accommodation costs, and other expenses incurred by a party directly related to the proceedings.**
- (2) An agency may, by order, determine the amount of the costs of any proceeding and may order by whom and to whom costs are to be paid.**
- (3) In making an order under subsection (2) the agency shall consider,**
- (a) whether the party has or represents a sufficient interest in the outcome of the proceedings; as determined by the agency;**
  - (b) the conduct of the party in the course of the proceedings;**
  - (c) the contribution of the party to the better understanding of the issues by the agency; and,**
  - (d) whether a party has received a benefit as a result of the proceedings.**
- (4) An agency may establish a scale under which costs shall be assessed.**
- (5) An agency may appoint one of its members or employees as an assessment officer.**
- (6) A decision of the assessment officer may be appealed to the chairperson, who shall have the authority to amend the cost order, upon notice, or to direct any panel of the agency to consider the decision appealed from and confirm the decision or make a fresh decision, which may not be similarly appealed.**

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(7) For the purposes of this section, costs include, legal fees, experts' fees, witness fees, fees for the preparation of evidence, travel and accommodation costs, and other direct expenses incurred by a party to the proceedings.

### **9.14.1 HEARING EXPENSES**

I discussed hearing expenses in Chapter Seven. Now I set out the proposed recommendation amendment to the *SPPA*.

### **HEARING EXPENSES**

70. (1) The expenses of an agency incurred in determining any matter may be recovered from any or all of the parties by an expense recovery order made by the agency.
- (2) In making an order under subsection (1), an agency shall consider,
- (a) whether a party has or represents a substantial interest in the outcome of the proceedings, as determined by the agency;
  - (b) the conduct of the party in the course of the proceedings;
  - (c) the contribution of the party to the better understanding of the issues by the agency; and,
  - (d) whether a benefit has accrued to a party as a result of the proceedings.
- (3) In addition to any expenses to be recovered under subsections (1), an agency may make an order respecting the recovery of costs and hearing expenses from a party, or his or her counsel or agent, where the agency determines that the costs and hearing expenses have been needlessly increased due to the conduct of the party, counsel or agent.
- (4) An order under subsection (1) shall not be made without giving an opportunity to the party, counsel or agent to make submissions.

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#### 9.14.2 EXPENSE RECOVERY FROM NON-PARTIES

From time to time, agencies will make orders and decisions which confer a benefit on persons other than the parties to proceedings. In planning matters, for example, permission to develop a property may enhance the value of adjacent lots. Where a person has obtained clear and direct benefit from an agency decision, I believe that some portion of the agency's hearing expenses should be recovered from such a person, even though the person is not a party. Of course, such a person should be given notice and an opportunity to make submissions.

#### RECOVERY OF EXPENSES

**71. (1) Where a person has received a substantial benefit as a direct result of a decision made by an agency and where that person has not participated as a party, an agency may, by order, recover some proportion of the hearing expenses of the agency, in proportion to the value of the actual or potential benefit, deemed by the agency to have been gained by that person.**

**(2) An order under subsection (1) shall not be made without giving the person affected an opportunity to make submissions.**



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## 9.15 INTERIM DECISIONS

Some agencies have the authority to issue interim decisions and some do not. In my view, agencies should have the power to issue interim decisions.

Section 15(8) of the *Ontario Energy Board Act* provides:

The Board may adjourn any proceeding from time to time and may make interim orders pending the final disposition of the matter before it.

Section 21 of the *SPPA* provides for adjournments but says nothing about the issuance of interim orders. There may be a need to make interim orders for a number of reasons, depending on the circumstances. This is a very common occurrence for all agencies.

What is essential is that in addition to the power to adjourn and issue interim orders, it must be made clear that the final order can change the interim order and make the effective date of the final order retroactive to a date selected by the agency.

A decision was rendered by the Federal Court of Appeal in 1987 in a Bell Telephone rate case, in which the CRTC had issued an interim decision. The CRTC in its final decision altered the relief given in the interim decision. The case involved a \$200 million rebate which the CRTC decided in the final decision should be rebated to the customers of Bell. The Court held with a dissent, that the section of the CRTC legislation which enables the CRTC to issue interim decisions, does not include the power to change the decision by a subsequent decision.

Such a decision flies in the face of all regulatory decision-making in North America and if upheld would seriously impair how regulation is conducted in the future, unless legislation makes it clear that final decisions can be retroactive if preceded by an interim decision.

On June 22, 1989, the Supreme Court of Canada overturned the Federal Court of Appeal and upheld the CRTC. The Supreme Court rejected the common law principle that decisions

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are not to have a retroactive effect, in favour of the clear intention of Parliament empowering the CRTC to regulate rates in the public interest.

The early decision shows the fine line between a court legislating and a court interpreting legislation.

To make sure that agencies can issue interim orders from time to time, and that such orders can be changed by the final disposition in the matter, I recommend that there an amendment be introduced to the *SPPA*:

## **INTERIM DECISIONS AND ORDERS**

**72. (1) An agency may make interim orders, pending a final order in any proceedings before it.**

**(2) An agency may, by final order vary, alter or confirm an interim order and may make a final order retroactive to the date of the interim order.**

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## 9.16 REASONS FOR DECISION

There is no common law requirement that a decision must be accompanied by reasons. Some statutes are silent about an agency giving reasons for a decision; other statutes require that an agency give reasons for a decision, if requested. No statute in Ontario requires that an agency give reasons for each decision.

I believe that, given the possibility of reviews by the Ombudsman and the courts, not to mention the Cabinet or even by the agency itself, it is essential for an agency to issue decisions that have four clear parts.

- (i) An introductory section which outlines how the matter came to the agency, the names of the parties, the times and information about the sittings, the authority of the agency to deal with the matter and the nature of the issues.
- (ii) An outline of the evidence at the hearing.
- (iii) The findings of the agency on the issues before it.
- (iv) The reasons for each agency finding in some detail.

It is not enough to set out the issues, then report the evidence and end up with the findings. What is missing is the step that tells the court, the Cabinet, the persons involved or whomever, how the agency tied the evidence to the conclusion and why. This is the step which sets forth the reasoning of the agency members.

A party involved in a hearing is entitled to have a decision promptly after the matter has been heard, which gives not only the decision itself, but how it was arrived at. If an agency does not give reasons, there is a risk that a court will send the decision back to the agency to be reheard or rewritten without proper guidance. Worse, an application may succeed or fail for reasons unrelated to the agency's reasons.

Every agency which takes any pride in its procedure will want to have its decisions upheld on review or appeal. It is, therefore, in the interest of all agencies that they properly set forth

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in their decisions, their reasons for making the decision in the first place. Certainly the Cabinet, upon petition, will want to know why an agency made the decision which it made, when the Cabinet comes to dispose of the petition.

I have been told by some agency members and arbitrators that decisions with reasons are nothing more than an invitation to a party to take the matter to a court for appeal or review. I simply cannot accept that argument when compared to the right of a party to know why, and how a matter was decided, either for or against his interests.

I recommend that there be an amendment to the *SPPA* which requires that reasons for decision be given by every agency to which this Act applies.

## **REASONS FOR DECISION**

- 24. An agency shall give any interim or final decision in the form of an order and shall give, in addition to the order, reasons in writing.**



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## 9.17 NON-LIABILITY FOR DAMAGES

At common law, where a public official makes a decision which adversely affects the rights of others, the official will be protected from actions in damages, provided the official has not acted in bad faith. This means that a member of an agency will not be liable in damages for errors in procedure or wrong decisions, provided always that the member has not acted in bad faith.

Acts of bad faith include malicious or fraudulent acts, intentional misuse of power, and acts motivated by improper considerations. Thus, a public official or agency member may be liable for improper or arbitrary exercise of power. As Dicey says, "All Public Officials are subject to the Law." In Canada, the leading case is *Roncarelli v Duplessis*, where Duplessis, the then-premier of the Province of Quebec was held liable for damages for improperly cancelling Roncarelli's liquor licence.

The common law principle is set out in some statutes. For example, section 25 of the *Ombudsman Act* provides:

"No proceedings lie against the Ombudsman, . . . for anything he may do or report or say in the course of the exercise or intended exercise of his functions under this Act, unless it is shown that he acted in bad faith."

I recommend that a similar provision be included in the amended *SPPA* to ensure that agency members are similarly protected.

Section 24(1) of the Charter of Rights and Freedoms may impose a stricter standard. The law is evolving in this area. The Federal Court, Trial Division, awarded punitive damages against the RCMP for refusing a party access to counsel. The Court applied an objective standard, a flagrant disregard of Charter rights, in awarding damages.

In *Vespoli v. R.*, damages were assumed on a compensatory, not punitive, basis, and the court applied a subjective test, that of bad faith. Damages may be awarded if an agency member flagrantly breaches a clear Charter right.

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The draft amendment is as follows:

- 74. No proceedings lie against an agency or a member of an agency for anything done, reported or said in the course of the exercise or intended exercise of their functions, unless it is shown that an agency or member of an agency acted in bad faith.**

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## 9.18 NON-LIABILITY FOR COSTS

In this part, I use the term “costs” and “court costs” in a traditional sense. “Costs” mean the sum of money awarded by a court payable to the successful party in proceedings by the unsuccessful party of a partial, (party and party costs) or total (solicitor and client costs), indemnification of legal and other fees and court disbursements incurred by the successful party during the proceedings.

Agencies frequently, and individual members of agencies much less frequently, may be parties to court proceedings, including, appeals, application for judicial review, stated cases, and other claims. Both agencies and individual members of agencies may be liable in costs should the agency or individual member be unsuccessful in proceedings.

It is rare for a court to award costs against an agency. See, for example, Mr. Justice Reid’s remarks in *Re: Coates*. Mr. Justice Reid was unable to award costs against CRAT because in strict law, the party respondent in the appeal was the Director of Motor Vehicle Licensing and not CRAT. Moreover, in practice, most ministries pay or indemnify agencies against cost awards.

However, it would be desirable for reasons of consistency and certainty, to provide that cost awards against agencies be paid by the ministry responsible for the agency. In the case of cost awards against individual members of agencies, the same provision should apply, except in those situations where a member is shown to have acted in bad faith.

Accordingly, I recommend that the *SPPA* be amended as follows:

- 75. (1) Where costs in proceedings are awarded by a court against an agency or a member of an agency, the Crown shall be liable, therefore, as if the award were made against the Crown.**
- (2) Where costs in proceedings are awarded by a court against a member or employee of an agency, the Crown may recover the amount of the award from the member or employee where the member or employee has acted in bad faith.**

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## 9.19 CONSULTATION BY AGENCY MEMBERS

A major problem which all decision-making agencies face is the need to consult within the agency before issuing a decision. Such consultation is contrary to principles developed by the courts over hundreds of years. The rule which the courts have developed over centuries is that “he who hears must decide”. Only the person who hears the evidence and sees the witnesses, should take part in the decision-making of the case at hand. This rule has been applied by the courts to agency members and there are even cases which prevent the presence of anyone else in the room while the decision is being made except the panel members themselves. This is judge-made law and should be changed by the Legislature. For a variety of reasons these principles are not in the best interests of sound decision-making by administrative agencies in Canada.

A classic discussion of the pros and cons of this judge-made law took place in the well-known *Consolidated Bathurst* case before the Supreme Court of Ontario. In that case, the Ontario Labour Relations Board panel, which heard a case, presented its decision for discussion to the whole Board, including any members who had neither heard the evidence nor seen the witnesses.

The Divisional Court in a two-to-one decision held that the Board panel ought not to have considered the decision in the presence of members who had not sat on the case. The Court of Appeal, in a unanimous decision, reversed the Divisional Court, holding that, for that Board, under that statute, it was acceptable to discuss the decision among other members, so long as it remained the duty of the panel which heard the matter, to make the decision. The Court went on to say that, if during consultation, new material was discussed, it should be put before the parties, in a reconvened hearing. The decision is now being appealed to the Supreme Court of Canada (SCC).

Any decision by the SCC, even if it upholds the Court of Appeal, will be limited to the *Labour Relations Act* and apply only to the Labour Relations Board, without canvassing whether the same rule would apply to any other Ontario agency. This leaves the applicability of the decision in doubt for other agencies in Ontario.



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Regardless of what the SCC decides, I recommend that agencies, when making decisions, should be empowered, but not required, to consult their fellow agency members and staff. This is not a major departure from the way in which many agencies now handle their decision-making, nor would it be a major departure from some of the decided cases.

There are agencies in Canada which have the right to have one member hear the evidence, listen to the witnesses, and then report back to the agency, which will then make the decision. The *National Energy Board Act* is a classic example. This is the “hearing-officer” concept. There is no doubt that this method contravenes the judge-made rule of “he who hears must decide.” The advantages of consultation must be obvious to anyone with experience as an agency member.

It comes down to consistency in matters of law and policy and the avoidance of errors of a general sort. On questions of law, it is essential that an agency be consistent in its decisions. Without consultation, it is possible that different panels of the same agency might make different findings of law upon indistinguishable sets of facts, conceivably even on the same day. Two panels on the same day coming to two different conclusions as to the same law is not in the best interests of sound administrative justice and can lead to great instability in the decision-making process.

A way to avoid this problem is to permit the panel to circulate its decision to all members of the Board and to the legal branch of the agency for its comments on the law. Another way to manage differences of opinion on the law by agency members is to provide an amendment to the *SPPA* that the opinion of the Chair, in such a case, shall prevail. Such a provision is found in the *Ontario Municipal Board Act*, which reads:

“14. The chairman, when present, shall preside at all sittings of the Board, and his opinion upon any question of law shall prevail.”

The avoidance of error is a further important advantage of consultation. No decision should be issued which contains a factual error and which could have been avoided had the error been spotted during circulation before being released. There are errors and there are errors!

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Some errors, an agency may in law be able to correct, and some it may not be able to correct, after the decision is issued.

Correcting a decision *ex post facto* may be very expensive, and in any event, does nothing to enhance the credibility of the agency. We all know that errors can creep into any decision. They ought to be caught as soon as possible. This can be done if the decision is circulated to a select number of the staff who can check each statistic and fact, against the exhibits and the transcripts. A 500 page decision based upon 7,000 pages of transcript and 500 exhibits is a wonder if it is error free.

Very often a thought, a sentence, or a paragraph which looks very clear to the panel may seem confusing or imprecise to other persons, in which case that portion may need to be restated. A decision of a tribunal which is confusing, hard to follow or contradictory is misleading and sends out the wrong signals to the public. There will also be a far greater improvement in the quality of decision writing, if the decisions can be circulated for comment.

On questions of policy, the same argument applies. Some agencies may sit 20 or 30 panels in the same day in many parts of the province, dealing with much the same set of facts. Decisions may reflect, or need to reflect, statements of government policy or even comply with directives given to the agency by the government, or with some instruction by the Lieutenant Governor, a Minister or a Committee of the House. Reviews by an agency of its decisions are necessary to see that these, when applicable, are respected and reflected, and that their expression is consistent and understandable.

All members, and particularly new members, may not be aware of the applicable government policy on a specific subject. It is of great importance to be sure that a decision being issued today is consistent with a decision made four years ago, on the same set of facts. If it is not, the agency must make it clear in its decision, why the earlier decision is being departed from by the agency. This is particularly important where an agency can, and does lay down policy, which while it may not fetter the agency in the future, should not be departed from without some clear explanation. Two policies going in two different directions are more than likely unless there is some review of the decisions before they are released.

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Consultation can lead to much higher standards of decision writing by agency members. Well written decisions and well conducted hearings seldom lead to judicial review or public dissatisfaction. Well conducted hearings and well written decisions lead to fairness and a reputation of a caring government. What many bureaucrats and politicians alike often do not appreciate is that administrative hearings and agency decisions, are to the public, a leading edge of government. Government can not escape responsibility for the performance of administrative agencies nor can the administrative agencies themselves.

Poorly written decisions are as inexcusable as badly conducted hearings. However when one realizes the limited experience of most agency appointees and the absolute dearth of training, it is a wonder to me that agencies have as good a record as they do with the public. Writing and the ability to express oneself, clearly are arts, to be learned over time, for most of us.

Different strengths and abilities are involved in deciding a matter than in writing a decision. Many more men and women can make a wise decision than can issue a well written one.

One is told that when judges sit alone, they decide alone and do not consult during the decision-writing period. While this may be appropriate for judges, I believe that the practice is not suitable for administrative agency decision-writing. A very good case can be made for having assistance in the drafting of agency decisions. I have earlier discussed the differences between the role and qualifications of a judge as opposed to a member of an administrative agency. The major role of an agency member is to decide, rather than to write.

Very few lawyers write as well as they think they do, and I am no exception. But we could all write a great deal better with some special training. Judges take courses in decision writing and I believe demonstrate the benefit of the experience. But nothing is offered to agency members to improve the quality or structure of their writing. While it is hard to describe a well written decision, it is not difficult to spot one. Basically a good decision is one that says what is right, says it well and briefly.



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A marked improvement would occur immediately after an agency adopts a circulation procedure for decisions, among its members who did not sit on the hearing and who are not burdened with the pride of authorship. When decisions are circulated among one's peers, each member searches for ways in which the decision can be made clearer, structured better and made more precise.

Agencies can also immediately improve the quality of their decisions by engaging an editor, for an important case or for general advice. The editor may suggest a framework around which to build the decision in association with the panel members and then will make sure that whatever the panel decides, is clearly and precisely expressed. An editor, being an outsider, can make many valuable suggestions particularly when an agency may be issuing a long, complicated decision.

Many of the world's leading authors and the best publishing houses retain editors. An editor may well need to be brought into the matter long before the decision writing begins to get a sense of what is involved. During my chairmanship at the Ontario Energy Board for several important hearings, we retained an editor who sat through a few hearing days and some internal conferences to understand the undercurrents of the case. Using an editor from time to time, not only improved the quality of our product, but taught us all a great deal about the techniques of decision writing.

The following is my proposed amendment to the *SPPA*. Amendments to protect agency member notes, agency documents and records are included in this proposed section.

## **CONSULTATION BY AGENCY MEMBERS**

- 76. (1) In making an interim or final order, and in preparing written reasons therefore, an agency member or panel may,**
- (a) consult with other members of the agency;**
  - (b) consult with editors and agency employees with respect to technical, scientific and drafting issues; and,**
  - (c) circulate draft reasons to other members of the agency;**



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**(2) Notwithstanding the provisions of the *Ombudsman Act* and the *Freedom of Information and Protection of Privacy Act* the notes, working papers and draft decisions and orders of a agency and members of an agency are privileged.**

**(3) Reports, documents, and other information and material supplied to an agency on a confidential basis are privileged for the purposes of the *Ombudsman Act* and the *Freedom of Information and Protection of Privacy Act*.**

**(4) Where a panel member consults with other agency members, editors and staff, or where draft orders or reasons are circulated, and new arguments or facts, likely to affect the order or decision, arise, the panel shall apprise the parties of the nature of the new arguments and facts and give the parties an opportunity to make submissions.**

**(5) The opinion of the chairperson on any question of law shall prevail.**

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## 9.20 POWER TO REVIEW, REHEAR, RESCIND OR VARY

Many of Ontario's administrative agencies do not have the statutory power to review or rehear their own decisions. In most cases, agencies cannot rescind or vary their orders. I believe that all agencies should have the jurisdiction to review a decision and as a consequence to rehear or reconsider a matter. The power to review is even more important where there is no appeal to the courts. Without this power, parties to hearings may be frustrated, issues may be caught up in complex court actions and wrong decisions may be unnecessarily perpetuated.

From time to time, it may come to the attention of an agency that it has failed to consider a fact not brought to its attention at the time of the hearing, or it has made a serious error of law, or the Ombudsman may request that an agency reconsider a matter for one reason or another. From time to time, a regulatory agency may conclude that it must review a decision which it has made because of changing economic or other conditions. Yet, the agency may be *functus*; that is, it has completed its task, and has no jurisdiction to reconsider or review a decision already made, even where the agency might be willing to make a change to the decision.

There has to be a finality to disputes, but if there is a choice between a mistaken decision and correcting that decision, the latter ought to be the course of conduct in administrative matters. No agency should be *functus*, particularly when the Ombudsman, the Committee of the Ombudsman and the Legislature have such immense powers relative to decisions of administrative agencies.

Some agencies, such as the Ontario Energy Board, do have the statutory right to rehear and review one of their own decisions as provided in section 30, of the *Ontario Energy Board Act*, which reads as follows:

“30.—The Board may at any time and from time to time rehear or review any application before deciding it, and may by order rescind or vary any order made by it.”

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An agency, being a creature of statute, has only the powers that are expressly given to it by its own statute or contained in any general statute of the Province, such as the *SPPA*. The agencies may also have some powers, in some circumstances, which a court may or may not imply. Thus all agencies have explicit powers and some agencies may have implicit powers.

Those agencies which, at present, do not have an explicit statutory power to review or rehear may have an implicit power to do so, but this implicit power is not clear or assured.

The doctrine of jurisdiction by “necessary implication “ (as it is called) permits in some cases, an agency to exercise powers which go beyond the precise powers set out in legislation. There are two qualifications to be met before implying a power which is not expressly set forth in legislation and these are:

- (i) The implied power must as a matter of practical necessity be required for the agency to accomplish its mandate.
- (ii) The implied power must not be one to which the Legislature has clearly addressed its mind.

(See *Re National Energy Board* (1986) 29 D.L.R. (4th) 35, (F.C.A.); *Interprovincial Pipeline V National Energy Board* (1977) 78 DLR (3rd) 401, (F.C.A.)

If the court has any doubt about implying the power, it will likely not imply it. Since the courts often will not go behind the four corners of the mandate to understand the scheme and operations of the Act in question, or are unfamiliar with the practice of agencies, and in some cases, won't even permit the agency to explain the nature of its obligations or the ramifications of the decision, it is clear to me that agencies should not have to rely on implied powers to carry out a mandate.

(See also *Ottawa Electric Light v Ottawa* (1906) 12 OLR 290).

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The difficulty with implied powers is that one never knows when or how they may be implied. There are powers which are sometimes implied by a court, which in my view ought to be explicit by statute in order to remove uncertainty.

The existence of a review or rehearing power of an agency does not mean that a reviewing court will necessarily send a matter back to an agency for a review or rehearing. The Court will not send a matter back if it is clear that the agency, having received the Court's direction on the law, could reach only one conclusion. Or if it is clear that an agency is unlikely to give a party a "fair review or rehearing", a court will not send the matter back.

There is an interesting discussion about when a court may imply a right for the agency to review one of its own decisions in a recent case entitled *Re Commercial Union* 1987 59 OR (2d) 481 and see a discussion of the matter in a text on administrative law on page 100 by Reid and David. See also a number of cases that I cited in a book entitled *Practice and Procedure Before Administrative Tribunals*, Chapter 28. (Carswells 1988).

The power should be given so that there is a discretion in the agency to review and rehear. If the agency decides to rehear the matter, then the hearing should take place in the same form as the first hearing. The power should relate to any decision, report or order of the agency. The decision not to rehear or review ought to be final and not reviewable again. The power should only be exercised to rehear or review a matter on the agency's own initiative or that of a party, where:

- (a) The agency is satisfied that it has made a material error of law, which if it had not made, would have changed its decision;
- (b) The agency is satisfied that a material fact which was not brought to its attention which, had it been, it might have changed the decision;
- (c) The agency has reviewed the prejudice which might be caused to a person, who in good faith, has relied upon the decision;
- (d) The agency may award costs where required.



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The amendment which I propose for agencies generally is not as broad as section 30 cited above. I do not propose that an agency can vary or rescind any order made by it unless it has first of all reviewed the order or decision in question, and then has invited submissions, after which it may rescind or vary the order or decision in question. It is also important to provide specifically that any panel of the agency may hold the review or the rehearing and not necessarily the panel which heard the matter in the first place.

It should be understood that by making explicit certain powers, which have often been exercised by implication, there is no intention to remove the court's jurisdiction to imply a power which it may feel is necessarily incidental to any explicit power given by a specific or general statute.

## **REVIEW, REHEAR, RESCIND OR VARY**

**77. (1) An agency may, of its own motion, or upon the application of any party or other interested person, at any time and from time to time rehear or review any proceedings before an order is made, and may by order rescind or vary any order or decision made by it.**

**(2) In considering whether to rehear or review a proceeding or to vary or rescind an order made by it, the agency shall consider:**

- (a) whether that agency has made a material error of law or fact;**
- (b) whether material facts exist which were not considered by the agency at the time of the first proceedings;**
- (c) whether the issues of law or fact are such that the agency might have reached a different decision; and,**
- (d) whether any party to proceedings or any other person, who has relied on the decision will be seriously, adversely affected by a revised decision.**

**(3) Where an agency decides to review or to rehear a decision, the agency shall make orders respecting the scope of the review or rehearing, the issues to be considered and the procedure to govern the review or rehearing.**

**(4) An agency may award costs and recover hearing expenses incurred on applications for and on review or rehearing proceedings.**

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## 9.21 PETITIONS TO CABINET

Petitions to Cabinet are a procedure by which a person asks the Cabinet to review a decision of an administrative agency. Petitions are sometimes mistakenly referred to as an “Appeal to Cabinet” which they are not. Traditionally, a petition asks the Cabinet to overturn a decision made by an agency, although the petition may also ask for other relief.

There is no right to petition the Cabinet of Ontario regarding an agency decision unless the mandating statute permits the petition. Some statutes which establish administrative agencies provide for a petition to the Cabinet and some do not. There are seven such statutes at present.

The clause which traditionally provides for a petition to the Cabinet is as follows (s.33 *Ontario Energy Board Act*):

“33. Upon the petition of any party or person interested, filed with the Clerk of the Executive Council within twenty-eight days after the date of any order or decision of the Board, the Lieutenant Governor in Council may:

- (a) confirm, vary or rescind the whole or any part of the order or decision; or
- (b) require the Board to hold a new public hearing of the whole or any part of the application to the Board upon which such order or decision of the Board was made, and the decision of the Board after the public hearing ordered under clause (b) is not subject to petition under this section.”

By such a “straight right to petition”, the Cabinet is basically permitted by the legislation to approve, vary or disallow a decision of an administrative agency. The legislation usually as well, permits the Cabinet to send the matter back to the agency to be reheard in whole or in part by the agency.

Early in the 1980’s, the Ontario legislation extended Cabinet petition powers to include the power to vary the decision, and to substitute its own decision. In any given year there are about 40 petitions to the Ontario Cabinet. I believe that the trend will decline because the

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newest agency legislation has moved away from providing for petitions. Under some Federal mandates, the Cabinet can initiate review on its own without the intervention of a petition. An example of such a provision can be found in section 64 of the CRTC legislation as follows:

“The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, or rule or regulation of the Commission; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.”

With such a provision in place there can be a petition to the Cabinet following which the Cabinet can approve, alter, vary, disapprove or send a decision back for a rehearing, or the Cabinet can substitute its own decision for that of the agency *or if there is no petition and even if there is*, the Cabinet may initiate its own review of the agency's decision and exercise the same powers as if there had been a petition.

There remain three questions to resolve:

## **1. ARE PETITIONS NECESSARY OR DESIRABLE?**

This Report inclines to gradualism and I would not recommend that existing rights to petition be removed. Petitions enable a Cabinet to correct some egregious error in an agency decision affecting public policy. A petition to the Cabinet costs about one 38 cent stamp and anyone who loses a matter before an administrative agency has nothing to risk by issuing a petition to the Cabinet, if only to intimidate one's opponent.

One should not lose sight of the fact that some decisions can be appealed to the courts. All decisions of agencies are subject to judicial review and many agencies can be asked to review and rehear their own decisions. I believe that in due course the Government will do away with petitions because there are so many other forms of relief, and petitions tend to turn the Cabinet into a kind of a Court of Appeal. It is apparent in Ottawa, for example, that when a petition is submitted, it goes to the responsible Ministry, which deals with it and a

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recommendation is then made by the Ministry to the Cabinet, which seems to rubber stamp the recommendation. There is no real hearing. If that is all that happens to a petition, then perhaps it is time to let the process die.

## **2. PETITIONS IN WHAT CIRCUMSTANCES?**

I believe that there should not be petitions to Cabinet from decisions where agencies are exercising an appellate function. Where an agency deals in matters which involve public policy such as a regulatory agency, I believe that petitions can easily be justified. However, when a petition involves a matter of law or the rights between parties or groups of parties where there is no major element of public policy, I believe that proper recourse should be to ask the agency to review its decision or apply to the courts for judicial review. In a Memorandum from the Attorney General dated September 27, 1988, addressed to me in response to a discussion with Mr. Scott he stated:

“The main, if only, function of a cabinet petition is to provide to the cabinet final authority over the decisions of selected regulatory boards that have a public policy component to them. Any other purpose would be better served by judicial review.

“The identification of this function leads to two observations about the current process. First, the petition process should be restricted to regulatory decisions with a distinct policy component that is not incorporated into a clearly defined set of statutory criteria. In any other case, Cabinet would be and occasionally is now required to perform the equivalent of a judicial review function (see the *Planning Act* and the unproclaimed *Truck Transportation Act* as two examples).”

## **3. SHOULD THE CABINET INITIATE PETITIONS?**

I believe that the Cabinet should have the authority to intervene in an agency decision where, in its opinion, there is a serious public policy implication. This is not a major change as may at first be thought. One of the major justifications for petitions to the Cabinet at the present time is to permit the Cabinet to review decisions involving public policy. It has been held by the SCC in *Inuit Tapirisat*



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(the leading case on the point) that when the Cabinet hears a petition, it is acting “legislatively” and is carrying out a political function and not an adjudicative function.

If that is the main reason for a petition, then that purpose would be satisfied if the Legislature were to give the Cabinet the right to initiate a review in all decisions from all administrative agencies. In that event, it would be known that the Cabinet will only intervene when it is of the opinion that there is an important public policy component involved.

I foresee, however, that a government might not want to have the authority to initiate a review of a decision, lest it be challenged to do so where it really did not want to do so. But surely it is better to have the power and have to defend not using it, than not to have the power and not be able to act when a decision involving major public policy is decided in a way that is inconsistent with Government policy. As a matter of fact, the recent difficulty with the Automobile Insurance Board’s decision could have been legally resolved, if the Cabinet had had the legal authority to vary the decision of the Board rather than saying it would vary it through legislation to follow. Until that legislation is enacted, the decision of the Board is the law. This creates a difficult hiatus for the industry and the insured alike, particularly if one gives any credence to what the courts have had to say about the reliance which in law, can be placed upon statements of intent to introduce new legislation. The Federal Court recently discussed the “seeming” certainty yet total uncertainty of the implementation of legislation, which had been introduced into Parliament, not to mention legislation which is promised but not yet introduced.

Can Cabinet, upon a petition of its own initiative, substitute a decision which goes beyond that which the agency could do within its jurisdiction? It is not clear whether the *Inuit Tapirisat* would permit the Cabinet to make any political decision it may want to make or whether the Cabinet must stay within the jurisdiction of the agency under review. I believe that the Government of Ontario, has, for many years, held that the Cabinet has no authority to decide anything beyond that which the agency could have decided.

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## **PETITIONS**

- 78. (1) The Lieutenant Governor in Council may at any time, in his or her discretion, of his or her own motion, vary, or rescind any order, decision, or rule of an agency, and any such order, decision or rule, varied, or rescinded is binding upon the agency and upon the parties to which the order, decision or rule applies.**
- (2) The Lieutenant Governor in Council at any time, in his or her discretion, of his or her own motion, may direct an agency to review an order, decision or rule, or to rehear a matter in whole or in part, and the Lieutenant Governor in Council may give such direction to the agency respecting the review or rehearing as she or he considers appropriate in the public interest.**

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## 9.22 POWER TO APPEAL TO THE COURTS

There are differences among an *appeal to the court*, an *application to the court* (and there are several kinds), a *stated case to the court*, a *petition to the Cabinet*, and an *application for judicial review*.

A court can get involved with an agency in many ways. It can prohibit it from acting, force it to act, declare that it has acted improperly, review what it has decided, give an opinion upon a question asked of the Court by the agency or hear an appeal from the decision of the agency based upon an error of fact or law or mixed fact and law. There are even appeals to a court which may hear the matter *de novo*.

Getting to the court may be accomplished through a statute or through the Common Law. (The “ordinary law” as Dicey refers to it!) What I am addressing in this section is the right of somebody or something to appeal to the court from the decision of an agency. No one can appeal to the court unless there is a statutory right making that possible. Most agency statutes do not provide for an appeal to the court but some do.

Even when there is a right of appeal, there are a great variety of bodies before which the appeal may be brought. These include a Minister, a Judge of the Provincial Court, a Judge of the Supreme Court, the Divisional Court, another agency, the Legislature, the Standing Committee on the Ombudsman, and, as well, the Cabinet.

Thus there are many avenues of relief that may be pursued to question the decision of administrative agencies. Most, however, are time-consuming and expensive with the exception of a complaint made to the Ombudsman. The relief through the Ombudsman has been addressed in Chapter Six.

My purpose in addressing the matter of appeals to the court is to limit appeals to the Divisional Court with leave of the Court. I would of course recommend that no appeals should be *de novo*.

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## APPEALS

- 79. (1) Notwithstanding the provisions of any other Act of general or special application, no appeal lies from a decision or order of an agency except to the Divisional Court, with the leave of the Court, on questions of law.**
- (2) An agency is entitled as of right to be heard by counsel on a motion for leave under this section and, where leave is granted, on an appeal under this section.**
- (3) Notwithstanding the provision of any other Act of general or special application, no appeal *de novo* lies from a decision or order of an agency.**
- (4) An agency and its members are not liable for costs on applications and appeals under this section.**



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## 9.23 CABINET AND MINISTERIAL DIRECTIVES

Cabinet and ministerial directives go to the heart of the agency concept. On the one hand, agencies are expected to make decisions “at arm’s length”. At the same time, agencies account to a Ministry. How can these two duties be balanced? The law on this question is complex, but it is important to understand the problems before considering revised legislation in this area.

The Common Law presumes that an agency to which has been delegated a duty to make a decision, will make that decision in an unfettered fashion, free from its own earlier decisions and free from all directions of the Ministry to which it accounts. The result of this presumption is that unless that legislation gives a Ministry or the Cabinet authority to give the agency directions as to what decision to make, then no such directions shall be given, and if given, may result in the decision of the agency becoming a nullity.

If an agency accepts and acts upon directions of a Minister, *prima facie*, it is fettering its discretion and it would likely be deemed to have exceeded its jurisdiction. In the absence of a statutory power to give directions, an agency is not to be bound by government policy. Any decision of an agency which has blindly accepted government policy may be a nullity. The SCC in a very precise judgement by Justice Estey, established such a proposition in *Barrie and Township of Vespra* [1981] 2 SCR 145.

I caution the reader to remember that the law to which I am referring relates to agencies which hold hearings, and not to operating agencies or agencies which are of an advisory nature. This is an important distinction to make in appreciating the Canadian law on the matter of issuing directives and fettering one’s judgment. The reader may be interested to read a recent decision of the Divisional Court in *MacCosham Van Lines et al* (1989) O.R. (2d) 198, where the Ministry of Transportation and Communications had issued a “guide” to the Ontario Highway Transport Board and which the Court held had no binding effect upon that agency.

There is an important exception to the rule that the Minister or the Lieutenant Governor in Council may not bind an agency. Simply stated, a Minister or a Cabinet may give directions

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to an agency if a statute clearly enables him or her or it to do so. There are several ways in which a Cabinet or a Minister may be authorized by legislation to issue directives to an agency. The first and, I believe, the best, is the approach taken by the Parliament of Canada in its dealings with the CRTC. The Cabinet is given the power to give discrete directions to the CRTC, after having given advance notice to Parliament of its intent to issue a directive. The following is the text of the most recent amendment of the CRTC legislation dealing with the power to issue directives:

“7. (1) Subject to subsection (2) and section 8, the Governor in Council may, by order, issue to the Commission directions of general application on broad policy matters with respect to

- (a) any of the objectives of the broadcasting policy set out in subsection 3 (1); or,
- (b) any of the objectives for the regulation and supervision of the Canadian broadcasting system set out in subsection 5 (2).

“(2) No order may be made under subsection (1) in respect of the issuance of a license to a particular person or the amendment, renewal, suspension or revocation of a particular license.

“(3) An order made under subsection (1) is binding on the Commission commencing on the day the order comes into force and, subject to subsection (4), shall, if it so provides, apply with respect to any matter pending before the Commission on that day.

“(4) No order made under subsection (1) may apply with respect to a licensing matter pending before the Commission where the period for the filing of in the matter has expired unless that period expired more than one year prior to the coming into force of the order.

“(5) A copy of each order made under subsection (1) shall be laid before each House of Parliament on any of the first fifteen days on which the House is sitting after the making of the order.

“(6) The Minister shall consult with the Commission before the Governor in Council makes an order under subsection (1).”

“8. (1) Where the Governor in Council proposes to make an order under section 7, the Minister shall cause the proposed order

- (a) to be published by notice in the Canada Gazette, which notice shall invite interested persons to make representations to the Minister with respect to the proposed order; and,

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(b) to be laid before each House of Parliament.

“(2) Where a proposed order is laid before a House of Parliament pursuant to subsection (1), it shall stand referred to such committee thereof as the House considers appropriate to deal with the subject-matter of the order.

“(3) The Governor in Council may, after the expiration of forty sitting days of Parliament after a proposed order is laid before Houses of Parliament in accordance with subsection (1), implement the proposal by making an order under section 7, either in the form proposed or revised in such manner as the Governor in Council deems advisable.

“(4) The Minister shall consult with the Commission before a proposed order is published or laid before a House of Parliament under subsection (1).

“(5) In this section, ‘sitting day of Parliament’ means a day on which either House of Parliament sits.”

One can clearly see here that the power given to the Minister is the power to issue a binding directive. A second and contrasting approach to directives is found in the provisions of the *Ontario Planning Act* (sec. 3), where there is no power to issue a directive that binds, only the power to issue policy statements which do not bind, but which are to be considered by the agency in reaching its decision. These two powers are very different in their meaning and particularly in their application and effect. Section 3 provides:

“(3(1) The Minister, or the Minister together with any other Minister of the Crown, may from time to time issue policy statements that have been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister are of provincial interest.”

“(5) In exercising any authority that affects any planning matter, the council of every municipality, every local board, every minister of the Crown and every ministry, board, commission or agency of the government, including the Municipal Board and Ontario Hydro, shall have regard to policy statements issued under subsection (1).”

I can state as a fact that the Government of the day did not intend Section 3 to constitute a power to issue a directive but merely that the various agencies should take the statements of policy into consideration and give them whatever weight seems appropriate in the circumstances.



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This section was enacted with the dicta of the SCC in the *Innisfil* case clearly in mind. The Government was not ordering the agencies to follow the policy but rather required them to take the policies into consideration when weighing all of the evidence before them. The reason for this is obvious to those who work in the field of government policy. Policies are general in nature and may not fit a specific set of circumstances.

A third way in which a Cabinet or a Minister can communicate with an agency is where the legislation enables the Minister to give notice to the agency that the matter before the agency is of “provincial interest”, and where the statute, in addition, provides that the decision of the agency will not take effect until it has been amended or approved by the Cabinet. Such a provision is found in the *Ontario Planning Act*.

The purpose of this kind of legislation is that a) public notice is given prior to the hearing, b) the public and the agency know the nature of the provincial interest, and c) everyone knows that the decision may be rejected by the Cabinet for policy reasons.

The very basis of agencies which hold hearings is that there is the presumption that they will apply their own judgment and discretion to decide the matter before them. This presumption is removed where the mandating legislation or some general or specific statute clearly provides that directions may be given to the agency.

Thus if a government wants to give directions to an agency, the only way that it can be legally done is for the Legislature to give to the Cabinet the clearest authorization to issue directives to the agency. No other communications bind an agency in reaching its decision.

I have observed elsewhere in this Report that agencies do make policy with every decision they issue and that when their decisions are read together, they constitute the clearest planks of a policy. When one hears a person say that agencies do not and should not make policy, one must bear in mind that there is a confusion in the terms being used by the speaker. Agencies do make policy every day and with every decision, and that is what the legislation envisaged. (See the decision of the Supreme Court of Canada in *Re Capital Cities*). The policy the agency makes is policy within the framework of the mandate of the agency, and is



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not to be confused with government policy. There is a substantial difference between the two. Agencies do not make government policy, but on the other hand, the decisions they issue are statements of policy. Because agencies do make policy, and sometimes their decisions can constitute important policy that can affect a government, I believe that a Cabinet should have the authority to review, vary, rescind or alter a decision of an agency which deals with a matter of public policy. A modern technique becoming more common in usage is the power of Cabinet to issue directives to agencies where public policy is involved.

The Cabinet or a Minister has many alternatives when dealing with policy.

- a) They can wait until the agency makes a decision, and where petitions to the Cabinet are allowed and entertained, then deal with the decision as petitioned. This is hazardous because few statutes permit petitions. Even where a petition is permitted, no one may petition. This is why I have recommended an amendment to the *SPPA* which would allow the Cabinet, in the event of no petition, to initiate a review of a decision of an agency where there is a substantial public policy issue involved. The difficulty and disadvantage of the petition or review process is that it is *ex post facto*. The deed has to be done before it can be addressed, and in addition a lot of money and time will have been wasted which might have been avoided had the Cabinet or the Minister had the authority to issue a directive to the agency.
- b) The Cabinet through a Minister, may “speak” to the Chairperson of an agency to express some concern in a proceeding about to take place or presently taking place before an agency. I do not recommend this procedure, not just because it is illegal, but because it is unnecessary and compromises both the integrity of the agency system and the Ministry. In addition, a little of that process leads to a lot of it and ultimately to an attack in the courts. Our whole concept of administrative agencies is built upon unfettered discretion in the making of the decision. Where it can be shown that there has been Ministerial pressure applied, the decision of the agency can become a nullity. If a Minister really wants to run an agency, the duties of the agency should be returned to the Ministry.

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- c) The Cabinet or the Minister may legally issue a directive to an agency if it or he is authorized by a statute of general application or by the mandating statute.
- d) Where the statute permits, the Cabinet may give notice before a hearing of “provincial interest” and as a result (if the statute so provides), the decision of the agency may be subject to rejection by the Cabinet as I described above.
- e) Where a statute permits, there may be statements of policy to which the agency “shall have regard”. Such are admonitions and not directions, though a decision of the Divisional Court has suggested that the contrary is so. The risk is that the agency will not give the statement of policy the weight it deserves and in any event, the statement will have to take its chances among the other evidence heard by the agency. In a recent decision of the Divisional Court, *Brennan v Minister of Municipal Affairs*, (1988) 63 O.R. (2nd) 236, the Court assumed, in an *obiter*, that the words “shall have regard to” in the *Planning Act* meant that the agency would be “bound” by the statement of policy. As I have stated, the Government of the day did not mean the words, “shall have regard to” to mean “shall be bound by”. However, the Divisional Court without an analysis of the intent of the new Planning Act, and in what seems to have been a disregard for the SCC decision in the *Innisfil* case, and without canvassing the alternate meanings to the words “shall have regard to”, indicated that the words “shall have regard to” would have bound the OMB in that case, had the Minister not failed to take the correct steps precedent. I hope that no one will rely on the *Brennan* case to mean anything more than when a statute tells Ministers that they must take certain steps precedent, that they must do so. That is all the *Brennan* case can stand for in my respectful opinion.

There is a presumption against the interpretation which the Court placed upon the phrase “shall have regard to” in light of Sections 22(5) and 34(28) of the *Planning Act*. These sections provide that if a matter comes before the OMB by way of an appeal or reference, the Minister can advise that the matter involves the “provincial interest”, in which case the decision is treated as a report of the OMB and is subject to the decision of the LGIC. The Government felt then and, I assume, feels now, that this strong power enables the Cabinet to control the decision of the Board under these circumstances. Therefore, the words “shall

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have regard to” cannot be interpreted as constituting a direction. From reading the decision, it is not apparent that the Court was made aware of this provision and in any event these sections are crucial to a correct understanding of the meaning of the words “shall have regard to”.

Section 8 of *Bill 204* adds section 9a to the *Power Corporation Act* as follows:

“9a. (1) The Minister may from time to time issue policy statements that have been approved by the Lieutenant Governor in Council on matters relating to the Corporation’s exercise of its powers and duties under this Act.

“(2) In exercising a power or duty under this Act, the Corporation shall respect any policy statement that relates to its exercise.”

This kind of “limp-wristed” legislation is an open invitation to the courts to intervene as to what the Legislature knew but did not say.

## **CABINET AND MINISTERIAL DIRECTIVES**

**81. (1) Subject to subsections (2) and (6), the Lieutenant Governor in Council may, by order, issue to an agency directives of general application on broad policy matters with respect to the purposes and objectives of the agency.**

**(2) No order may be made under subsection (1) in respect to the legal rights, powers, privileges, immunities, duties or liabilities of any person, or the eligibility of any person to receive, or to the continuation of a benefit or licence, whether or not he or she is legally entitled thereto.**

**(3) An order made under subsection (1) is binding on the agency commencing on the day the order comes into force and shall, if it so provides, apply with respect to any proceeding pending before the agency on that day.**

**(4) A copy of an order made under subsection (1) shall be laid before the Legislative Assembly on any of the first fifteen days on which the Legislative Assembly is sitting after the making of the order.**

**(5) The Lieutenant Governor in Council shall consult with the agency before making an order under subsection (1)**

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**(6) Where the Lieutenant Governor in Council proposes to make an order under subsection (1),**

**(a) a copy of the proposed order shall be given to the agency;**

**(b) notice of the proposed order shall be published in the Gazette;**

**(c) a copy of the proposed order shall be laid before the Legislative Assembly:**

**(7) The Lieutenant Governor in Council may, after the expiration of thirty days after a proposed order has been laid before the Legislative Assembly in accordance with subsection (6), implement the proposal by making an order, either in the form proposed or revised in such manner as the Lieutenant Governor in Council deems advisable.**



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## APPENDIX 9-1

### ADMINISTRATIVE PROCEDURE ACT (5 U.S.C.)

#### 551. DEFINITIONS

For the purpose of this subchapter —

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include —

- (a) the Congress;
- (b) the courts of the United States;
- (c) the governments of the territories or possessions of the United States;
- (d) the government of the District of Columbia;

or except as to the requirements of section 552 of this title —

- (e) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (f) courts martial and military commissions;
- (g) military authority exercised in the field in time of war or in occupied territory; or
- (h) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) “person” includes an individual, partnership, corporation, association, or public or private organization other than an agency;

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(3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) “rule” means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

(8) “license” includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) “licensing” includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) “sanction” includes the whole or a part of an agency —

(a) prohibition requirement, limitation, or other condition affecting the freedom of a person;

(b) withholding of relief;

(c) imposition of penalty or fine;

(d) destruction, taking, seizure, or withholding of property;

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- (e) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
  - (f) requirement, revocation, or suspension of a license; or
  - (g) taking other compulsory or restrictive action;
- (11) “relief” includes the whole or a part of an agency —
- (a) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
  - (b) recognition of a claim, right, immunity, privilege, exemption, or exception; or
  - (c) taking of other action on the application or petition of, and beneficial to, a person.
- (12) “agency proceedings” means an agency process as defined by paragraphs (5), (7), and (9) of this section;
- (13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and
- (14) “ex parte communication” means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

## **552. PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS**

### **552a. RECORDS MAINTAINED ON INDIVIDUALS**

### **552b. OPEN MEETINGS**

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## 553. RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States;

or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

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(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

#### **554. ADJUDICATIONS**

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved —

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
- (2) the selection of tenure of an employee, except an administrative law judge appointed under section 3105 of this title;
- (3) proceedings in which decisions rest solely on inspections, test, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court;

or

- (6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

- (1) the time, place, and nature of the hearing;
  - (2) the legal authority and jurisdiction under which the hearing is to be held; and
  - (3) the matters of fact and law asserted.
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When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The Agency shall give all interested parties opportunity for —

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —

- (A) in determining applications for initial licenses;
  - (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
  - (C) to the agency or a member or members of the body comprising the agency.
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(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

## **555. ANCILLARY MATTERS**

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

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(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

**556. HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES;  
BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS OF DECISION**

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classe of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

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- (3) rule on offers of proof and receive relevant evidence;
  - (4) take depositions or have depositions taken when the ends of justice would be served;
  - (5) regulate the course of the hearing;
  - (6) hold conferences for the settlement or simplification of the issues by consent of the parties;
  - (7) dispose of procedural requests or similar matters;
  - (8) make or recommend decisions in accordance with section 557 of this title; and
  - (9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and request filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of

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this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

**557. INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY;  
SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD**

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses —

- (1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or
- (2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to

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submit for the consideration of the employees participating in the decisions —

- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of —

- (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
- (B) the appropriate rule, order, sanction, relief or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law —

- (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
  - (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;
  - (C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:
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- (i) all such written communications;
  - (ii) memoranda stating the substance of all such oral communications; and
  - (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

## **558. IMPOSITION OF SANCTIONS; DETERMINATION OF APPLICATIONS FOR LICENSES; SUSPENSION, REVOCATION, AND EXPIRATION OF LICENSES**

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule of order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within

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a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given —

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

## **559. EFFECT ON OTHER LAWS; EFFECT OF SUBSEQUENT STATUTE**

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

## **701. APPLICATION; DEFINITIONS**

(a) This chapter applies, according to the provisions thereof, except to the extent that —

(1) statutes preclude judicial review; or

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(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter —

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency; but does not include —

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory;  
or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title.

## **702. RIGHT OF REVIEW**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages

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and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

### **703. FORM AND VENUE OF PROCEEDING**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

### **704. ACTIONS REVIEWABLE**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

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## **705. RELIEF PENDING REVIEW**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

## **706. SCOPE OF REVIEW**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
  - (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
    - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
    - (B) contrary to constitutional right, power, privilege, or immunity;
    - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
    - (D) without observance of procedure required by law;
    - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
    - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
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In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

### **1305. ADMINISTRATIVE LAW JUDGES**

For the purpose of sections 3105, 3344, 4301(2)(D), and 5372 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may, and for the purpose of section 7521 of this title, the Merit Systems Protection Board may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees as established for the courts of the United States.

### **3105. APPOINTMENT OF ADMINISTRATIVE LAW JUDGES**

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

### **3344. DETAILS; ADMINISTRATIVE LAW JUDGES**

An agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law judges selected by the Office of Personnel Management from and with the consent of other agencies.

### **5372. ADMINISTRATIVE LAW JUDGES**

Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency

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recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title.

## **7521. ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES**

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are —

- (1) a removal;
- (2) a suspension;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less;

but do not include

- (A) a suspension or removal under section 7532 of this title;
- (B) a reduction-in-force action under section 3502 of this title;

or

- (C) any action initiated under section 1206 of this title.
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## APPENDIX 9-2

### STATUTORY POWERS PROCEDURE ACT

1. (1) In this Act,

- (a) “Committee” means the Statutory Powers Procedure Rules Committee;
- (b) “license” includes any permit, certificate, approval, registration or similar form of permission required by law;
- (c) “municipality” has the same meaning as in the *Municipal Affairs Act*, and includes a district, metropolitan and regional municipality and their local boards;
- (d) “statutory power of decision” means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,
  - (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
  - (ii) the eligibility of any person or party to receive, or to the continuation of, a benefit or license, whether he is legally entitled thereto or not;
- (e) “tribunal” means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute.

(2) A municipality, an unincorporated association of employers, a trade union or council of trade unions who may be a party to proceedings in the exercise of a statutory power of decision under the statute conferring the power, shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to parties. 1971, c. 47, s. 1; 1972, c. 1, s. 104 (6).

## PART I

### MINIMUM RULES FOR PROCEEDINGS OF CERTAIN TRIBUNALS

2. In this Part,

- (a) “hearing” means a hearing in any proceedings;
  - (b) “proceedings” means proceedings to which this Part applies. 1971, c. 47, s. 2.
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3. (1) Subject to subsection (2), this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or afford to the parties to the proceedings an opportunity for a hearing before making a decision.

(2) This Part does not apply to proceedings,

(a) before the Assembly or any committees of the Assembly;

(b) in or before,

(i) the Supreme Court,

(ii) a county or district court,

(iii) a surrogate court,

(iv) a provincial court or a provincial offenses court established under the  
*Provincial Courts Act*,

(v) the Unified Family Court,

(vi) a small claims court, or

(vii) a justice of the peace;

(c) to which the Rules of Practice and Procedure of the Supreme Court apply;

(d) before an arbitrator to which the *Arbitrations Act* or the *Labour Relations Act* applies;

(e) at a coroner's inquest;

(f) of a commission appointed under the *Public Inquiries Act*;

(g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have power to make; or

(h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned. 1971, c. 47, s. 3, *revised*.

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4. Notwithstanding anything in this Act and unless otherwise provided in the Act under which the proceedings arise, or the tribunal otherwise directs, any proceedings may be disposed of by,

(a) agreement;

(b) consent order; or,

(c) a decision of the tribunal given,

(i) without a hearing, or

(ii) without compliance with any other requirement of this Act,

where the parties have waived such hearing or compliance. 1971, c. 47, s. 4.

5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings. 1971, c. 47, s. 5.

6. (1) The parties to any proceedings shall be given reasonable notice of the hearing by the tribunal.

(2) A notice of hearing shall include,

(a) a statement of the time, place and purpose of the hearing;

(b) a reference to the statutory authority under which the hearing will be held; and

(c) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in his absence and he will not be entitled to any further notice in the proceedings. 1971, c. 47, s. 6.

7. Where notice of a hearing has been given to a party to any proceedings in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in his absence and he is not entitled to any further notice in the proceedings. 1971, c. 47, s. 7.

8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. 1971, c. 47, s. 8.

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9. (1) A hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing concerning any such matters *in camera*.

(2) A tribunal may make such orders or give such directions at a hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as necessary to enforce the order or direction and may use such force as is reasonably required for that purpose. 1971, c. 47, s. 9.

10. A party to proceedings may at a hearing,

(a) be represented by counsel or an agent;

(b) call and examine witnesses and present his arguments and submissions;

(c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence. 1971, c. 47, s. 10.

11. (1) A witness at a hearing is entitled to be advised by his counsel or agent as to his rights but such counsel or agent may take no other part in the hearing without leave of the tribunal.

(2) Where a hearing is *in camera*, a counsel or agent for a witness is not entitled to be present except when a witness is giving evidence. 1971, c. 47, s. 11.

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12. (1) A tribunal may require any person, including a party, by summons,

- (a) to give evidence on oath or affirmation at a hearing; and
- (b) to produce in evidence at a hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceedings and admissible at a hearing.

(2) A summons issued under subsection (1) shall be in Form 1 and,

- (a) where the tribunal consists of one person, shall be signed by him; or
- (b) where the tribunal consists of more than one person, shall be signed by the chairman of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal; and
- (c) shall be served personally on the person summoned who shall be paid like fees and allowances for his attendance as a witness before the tribunal as are paid for the attendance of a witness summoned to attend before the Supreme Court.

(3) Upon proof to the satisfaction of a judge of the Supreme Court of the service of a summons under this section upon a person and that,

- (a) such person has failed to attend or to remain in attendance at a hearing in accordance with the requirements of the summons;
- (b) a sufficient sum for his fees and allowances has been duly paid or tendered to him; and
- (c) his presence is material to the ends of justice,

the judge may, by his warrant in Form 2, directed to any sheriff, police officer or constable, cause such witness to be apprehended anywhere within Ontario and forthwith to be brought before the tribunal and to be detained in custody as the judge may order until his presence as a witness before the tribunal is no longer required, or, in the direction of the judge, to be released on a recognizance (with or without sureties) conditioned for appearance to give evidence.

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(4) Service of a summons and payment of tender of fees or allowance may be proved by affidavit in an application under subsection (3).

(5) Where an application under subsection (3) is made on behalf of a tribunal, the person constituting the tribunal, or where the tribunal consists of two or more persons, the chairman thereof may certify to the judge the facts relied on to establish that the presence of the person summoned is material to the ends of justice and such certificate may be accepted by the judge as proof of such facts.

(6) Where an application under subsection (3) is made by a party to the proceedings, proof of facts relied on to establish the presence of the person summoned is material to the ends of justice may be by affidavit of such party.

13. Where any person without lawful excuse,

(a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or

(b) being in attendance as a witness at a hearing, refuses to take an oath or make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his power or control legally required by the tribunal to be produced by him or to answer any question to which the tribunal may legally require an answer; or

(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on application of a party to the proceedings, state a case to the Divisional Court setting out the facts and that court may, on application on behalf of and in the name of the tribunal or by such party, inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of court. 1971, c. 47, s. 13.

14. (1) A witness at a hearing shall be deemed to have objected to answer any question asked him upon the ground that his answer may tend to incriminate him or may tend to establish his liability to civil proceedings at the instance of the Crown, or of any person,

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and no answer given by a witness at a hearing shall be used or be receivable in evidence against him in any trial or other proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence.

(2) A witness shall be informed by the tribunal of his right to object to answer any question under section 5 of the *Canada Evidence Act*. 1971, c.47, s. 14.

15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

(4) Where a tribunal is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

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(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. 1971, c. 47, s. 15.

16. A tribunal may, in making its decision in any proceedings,
- (a) take notice of facts that may be judicially noticed; and
  - (b) take notice of any generally recognized scientific or technical facts, information, or opinions within its scientific or specialized knowledge. 1971, c. 47, s. 16.
17. A tribunal shall give its final decision and order, if any, in any proceedings, in writing and shall give reasons in writing therefor if requested by a party. 1971, c. 47, s. 17.
18. A tribunal shall send by first class mail addressed to the parties to any proceedings who took part in the hearing, at their addresses last known to the tribunal, a copy of its final decision and order, if any, in the proceedings, together with the reasons therefor, where reasons have been given, and each party shall be deemed to have received a copy of the decision or order on the fifth day after the day of mailing unless the party did not, acting in good faith, through absence, accident, illness or other cause beyond his control receive the copy of the decision order until a later date. 1971, c 47, s. 18.
19. (1) A certified copy of a final decision and order, if any, of a tribunal in any proceedings may be filed in the office of the Registrar of the Supreme Court by the tribunal or by a party and, if it is for the payment of money, it may be enforced at the instance of the tribunal or of such party in the name of the tribunal in the same manner as a judgement of that court, and in all other cases by an application by the tribunal or by such party to the court for such order as the court may consider just.
- (2) Where a tribunal having power to do so makes an order or decision rescinding or varying an order or decision previously made by it that has been filed under subsection (1), upon filing in accordance with subsection (1) the order or decision rescinding or varying the order or decision previously made,
- (a) if the order or decision rescinds the order or decision previously made, the order or decisions previously made ceases to have effect for the purposes of subsection (1); or
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- (b) if the order or decision varies the order or decision previously made, the order or decision previously made as so varied may be enforced in a like manner as an order or decision filed under subsection (1). 1971, c. 47, s. 19.

20. A tribunal shall compile a record of any proceedings in which a hearing has been held which shall include,

- (a) any application, complaint, reference or other document, if any, by which the proceedings were commenced;
- (b) the notice of any hearing;
- (c) any intermediate orders made by the tribunal;
- (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceedings;
- (e) the transcript, if any, of the oral evidence given at the hearing; and
- (f) the decision of the tribunal and the reasons therefor, where reasons have been given. 1971, c. 47, s. 20.

21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. 1971, c. 47, s. 21.

22. A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation. 1971, c. 47, s. 22.

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

(2) A tribunal may reasonably limit further cross-examination of a witness where it is satisfied that the cross-examination of the witness has been sufficient to disclose fully and fairly the facts in relation to which he has given evidence.

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(3) A tribunal may exclude from a hearing anyone, other than a barrister and solicitor qualified to practice in Ontario, appearing as an agent on behalf of a party or as an advisor to a witness if it finds that such a person is not competent properly to represent or to advise the party or witness or does not understand and comply at the hearing with the duties and responsibilities of an advocate or advisor. 1971, c. 47, s. 23.

24. (1) Where a tribunal is of opinion that because the parties to any proceedings before it are so numerous or for any other reason, it is impracticable,

(a) to give notice of the hearing; or

(b) to send its decision and the material mentioned in section 18,

to all or any of the parties individual, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

(2) A notice of a decision given by a tribunal under clause (1) (b) shall inform the parties of the place where copies of the decision and the reasons therefor, if reasons were given, may be obtained. 1971, c. 47, s. 24.

25. (1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

(2) An application for judicial review under the *Judicial Review Procedure Act*, or the bringing of proceedings specified in subsection 2 (1) of that Act is not an appeal within the meaning of subsection (1). 1971, c. 47, s. 25.

## PART II

### STATUTORY POWERS PROCEDURE RULES COMMITTEE

26. (1) The committee known as the Statutory Powers Procedure Rules Committee is continued and shall be composed of,

(a) the Deputy Attorney General who shall be chairman of the Committee, but in his absence or at his request his nominee shall act in his place;

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- (b) the chairman of the Ontario Law Reform Commission;
  - (c) a judge of the Supreme Court, appointed by the Lieutenant Governor in Council;
  - (d) a senior official in the public service of Ontario who is or has been a member of a tribunal to whose proceedings Part I applies, appointed by the Lieutenant Governor in Council;
  - (e) a member of the Law Society of Upper Canada, appointed by the Lieutenant Governor in Council;
  - (f) a representative of the public who is not a member of the public service of Ontario, appointed by the Lieutenant Governor in Council; and
  - (g) a professor of administrative law on the law faculty of a university in Ontario, appointed by the Lieutenant Governor in Council.

(2) A majority of the members of the Committee may exercise all the powers of the Committee. 1971, c. 47, s. 26; 1972, c. 1, s. 9 (7).

27. It is the duty of the Committee,

- (a) to maintain under continuous review the practice and procedure in proceedings to which Part I applies;
- (b) to maintain under continuous review the practice and procedure, before,
  - (i) tribunals upon which a statutory power of decision is conferred by or under an Act of the Legislature but which is not required under such Act or otherwise by law to afford to the parties to the proceedings an opportunity for a hearing before making a decision, and
  - (ii) a body coming within clause 3 (2) (e) or (g). 1971, c. 47, s. 27.

28. No rules of procedure to govern the proceedings of a tribunal to which Part I applies shall be made or approved except after consultation with the Committee. 1971, c. 47, s. 28.

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29. The Committee may require a tribunal to which Part I applies or coming with in clause 27 (b) to report to the Committee the rules of procedure governing its proceedings or, where there are no such rules, information as to the procedure followed by it and to formulate and report to the Committee rules to govern its proceedings. 1971, c. 47, s. 29.
30. Where power is conferred to make rules of procedure governing the proceedings of a tribunal to which Part I applies, such power shall include power,
- (a) notwithstanding section 15, to require that findings of fact of the tribunal be based exclusively on evidence admissible under the law of evidence and on matters that may be judicially noticed or of which notice may be taken under section 16 or on evidence admissible under section 15 and on matters of which notice may be taken under section 16;
  - (b) to require the oral evidence admitted at a hearing before the tribunal to be recorded;
  - (c) to limit investigation or consultation concerning the subject-matter of any proceedings by members of the tribunal prior to the hearing;
  - (d) to require that any member of the tribunal participating in a decision of the tribunal shall have been present throughout the hearing. 1971, c. 47, s. 30.
31. The Attorney General may assign one or more members of the staff of the Ministry of the Attorney General to be secretary or secretaries of the committee and the committee may prescribe the duties of the secretary or secretaries. 1971, c. 47, s. 31; 1972, c. 1, s. 9 (7)
32. Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply notwithstanding anything in thi Act, the provisions of this Act and of rules made under section 33 prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith. 1971, c. 47, s. 32.
33. Subject to the approval of the Lieutenant Governor in Council, the Committee may make rules respecting the reporting, editing and publication of decisions of the tribunals to which Part I applies. 1971, c. 47, s. 33.
34. The Committee shall report annually to the Attorney General. 1971. c. 47, s. 34; 1972, c. 1, s. 9 (7)
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## FORM 1

(Section 12 (2))

(Name of Act under which proceedings arise)

SUMMONS TO A WITNESS BEFORE ..... (*name of tribunal*) .....

RE:

TO:

You are hereby summoned and required to attend before the  
..... (*name of tribunal*) .....  
at a hearing to be held  
at ..... in the ..... of .....  
on ..... day, the ..... day of .....  
19 ....., at the hour of ..... o'clock in the ..... noon (local time),  
and so from day to day until the hearing is concluded or the tribunal otherwise orders, to  
give evidence on oath touching the matters in question in the proceedings and to bring with  
you and produce at such time and place .....  
.....  
.....

Dated this ..... day of ....., 19.....

(*name of tribunal*)

.....  
Member of Tribunal

### NOTE:

You are entitled to be paid the same personal allowances for your attendance at the hearing as are paid for the attendance of a witness summoned to attend before the Supreme Court.

If you fail to attend and give evidence at the hearing, or to produce the documents or things specified, at the time and place specified, without lawful excuse, you are liable to punishment by the Supreme Court in the same manner as if for contempt of that court for disobedience to a subpoena. 1971, c. 47, Form 1.

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FORM 2

(Section 12 (3))

BENCH WARRANT

PROVINCE OF ONTARIO

TO *A.B.*, Sheriff, etc.

WHEREAS proof has been made before me that *C.D.* was duly summoned to appear before the (*name of tribunal*) ..... at the hearing of the said tribunal at Toronto (*or as the case may be*) on the ... day of ... , 19....; that the prescense of the said *C.D.* is material to the ends of justice, and that the said *C.D.* has failed to attend in accordance with the requirements of the summons.

THESE are therefore to command you to take the said *C.D.* to bring and have him before the said tribunal at Toronto (*or as the case may be*) there to testify what he may know concerning the matters in question in the proceedings before the said tribunal, and that you detain him in your custody until he had given his evidence or until the said sittings have ended or until other orders may be made concerning him.

GIVEN UNDER MY HAND this ..... day of .....,

19...., at .....

.....  
Judge, S.C.O.

1971, c. 47, Form 2

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